Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1993

BITUMINOUS CASUALTY CORPORATION,
an Illinois corporation,

Respondent,

v.

TONKA CORPORATION, a Minnesota corporation,

Petitioner,

v.

BITUMINOUS CASUALTY CORPORATION, THE TRAVELERS INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, ZURICH INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, MISSION NATIONAL INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

David F. Herr, Esq.
Counsel of Record
Mary R. Vasaly, Esq.
Maslon Edelman Borman & Brand
3300 Norwest Center
Minneapolis, Minnesota 55402
(612) 672-8200

Attorneys for Petitioner
Tonka Corporation

1994 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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QUESTIONS PRESENTED

Petitioner seeks a writ of certiorari to review a decision of the Eighth Circuit Court of Appeals affirming a summary judgment against the Petitioner. The following questions would be raised in this writ:

A. When a moving party with the burden of persuasion under the applicable law moves for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and the non-moving party has submitted admissible evidence on an issue of material fact, may a court weigh the evidence and grant summary judgment against the non-moving party?

B. Did the Court of Appeals for the Eighth Circuit err in not certifying a question of Minnesota law to the Minnesota Supreme Court pursuant to Minnesota's statutory certification procedure when the question involved issues of state public policy not previously determined by Minnesota's courts?

RULE 29.1 STATEMENT

The parent corporation of petitioner, Tonka Corporation, is Hasbro, Inc. Tonka Corporation's subsidiaries (other than wholly owned subsidiaries) are Hasbro Italy Srl, Promo Toys, Srl, Hasbro Osterreich GES.mbH, Hasbro U.K. Ltd., and Hasbro Canada Inc.

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In The
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No. _____

Bituminous Casualty Corporation, an Illinois corporation,

Respondent,

-v.-

Tonka Corporation, a Minnesota corporation,

Petitioner,

-v.-

Bituminous Casualty Corporation, The Travelers Insurance Company, North River Insurance Company, Great American Insurance Company, Industrial Indemnity Company, Zurich Insurance Company, United States Fire Insurance Company, Mission National Insurance Company, Twin City Fire Insurance Company,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Tonka Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are those set forth in the caption on the cover of this petition.

OPINIONS BELOW

The opinion of the district court was issued on August 21, 1992, and is not reported. Appendix ("A-") 11. A panel of the Eighth Circuit Court of Appeals issued its decision on November 12, 1993. A-2. This decision is reported at 9 F.3d 51 (8th Cir. 1993). The Eighth Circuit denied Tonka's Petition for Rehearing on December 21, 1993. A-39. *See* 1993 U.S.App. LEXIS 33474 (8th Cir. Dec. 21, 1993).

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review of cases in the courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Under 28 U.S.C. § 2101(c), a writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. *See also* Sup. Ct. R. 13.1. The ninety day period runs from the date of the denial of a petition for rehearing. *Id.* at 13.4. In this case, the Eighth Circuit filed the decision which Tonka appeals on November 12, 1993. Tonka filed a petition for rehearing which was denied on December 21, 1993. A-39.

STATUTES INVOLVED

The Uniform Certification of Questions of Law Act, Minn. Stat. § 480.061 (1990), is set out in full in the appendix at A-40.

This case also raises issues concerning Rule 56, Fed. R. Civ. P., which is set out in full in the appendix at A-43.

STATEMENT OF THE CASE

I. THE FACTUAL RECORD

Tonka,[1] a toy manufacturer, purchased numerous comprehensive general liability insurance policies. These policies provided coverage for "all sums which [Tonka] shall become legally obligated to pay as damages because of injury to or destruction of property" caused by an occurrence. The Insurers also promised to defend Tonka against any suit alleging such injury. Tonka purchased these liability policies to provide it with coverage for the entire period it operated its manufacturing plant in Mound, Minnesota. In 1984, Tonka discovered the presence of a contaminant in the groundwater beneath the plant. After Tonka notified the Minnesota Pollution Control Agency ("MPCA") of the contamination, the MPCA required Tonka to provide it with information, undertake an investigation and monitor the site. Tonka requested its insurers to defend it in connection with its response to the MPCA and to indemnify it for the cost of complying with the MPCA's directives.

II. HISTORY OF THE LITIGATION

Bituminous Casualty Corporation ("Bituminous") commenced this action in May 1987 to avoid defending Tonka against the MPCA's claims. Jurisdiction in the

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[1]Hereinafter, petitioner (appellant in the Eighth Circuit), will be denominated Tonka Corporation or "Tonka." Respondents (appellees in the Eighth Circuit) will be referred to collectively as the "Insurers."

district court was premised on diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332. Tonka counterclaimed and brought third-party claims against the other insurers seeking to enforce their duty to defend Tonka pursuant to the comprehensive general liability insurance policies they sold to Tonka.

The Insurers moved for summary judgment in 1988 on the grounds that the costs of complying with the MPCA's orders were not "damages." The district court certified the question pursuant to Minn. Stat. § 480.061 (1990), to the Minnesota Supreme Court in a consolidated proceeding with two other pending actions. In *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990) ("*3M*"), the Minnesota Supreme Court held that injuries to the State's groundwater resources were "damages" which were covered by Tonka's insurance policies. In the course of its decision, the Minnesota Supreme Court specifically rejected a decision on the same issue rendered by the Eighth Circuit Court of Appeals in *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988) ("*NEPACCO*"). The Minnesota Supreme Court's decision reflected the State's public policy of enforcing the obligations of the insurance industry and encouraging prompt environmental clean-up. The court expressly left to the federal court, "the task of determining precisely which costs associated with the clean-up of the contaminated sites will be covered." 457 N.W.2d at 184.

After the Minnesota Supreme Court's decision, the parties commenced discovery. The Insurers again moved for summary judgment in March 1991 on the grounds that Tonka had allegedly intentionally caused the damage for which it sought coverage by discharging oil contaminated with trichlorethylene ("TCE") on the site during the 1950s knowing that such discharge would cause third-party property damage.[2] Although Tonka had used TCE in manufacturing and there was evidence that there had been site disposal of liquid wastes for a limited period during the 1950s, there was no evidence that Tonka knew at the time that there were chemicals in the waste or that its waste disposal activities would cause third-party property damage.[3] Moreover, the Insurers did not support the summary judgment motion with any scientific evidence of causation; rather they pointed to the site disposal in the 1950s and relied on an inference that this disposal caused the damages.

Tonka responded to the summary judgment motion by presenting the court with specific admissible evidence in the form of authentic documents and sworn affidavits from employees which showed that:

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[2]An insured may not recover under the policies for damages which are not "accidental" or which it expected or intended to cause.

[3]Tonka's liquid waste stream at the time included "still bottoms." Still bottoms are a mixture of oil and dirt that results from the toy degreasing process. TCE is used in that process and may have been present in the still bottoms. Its presence was accidental, however, because Tonka used a still to remove TCE from the waste and Tonka's employees at the time of the disposal believed the waste was TCE-free.

(1) Tonka did not know that there were contaminants in the oil which may have been deposited on the site;[4]

(2) Tonka had no intention or expectation that liquid waste deposited on the site would harm the groundwater or otherwise cause third party property damage;

(3) damage to the groundwater was not caused by intentional disposal of liquid waste on the site.

Tonka also requested that the court certify the legal issues in the case to the Minnesota Supreme Court since

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[4]Tonka submitted the following evidence: (1) Tonka always used a still to remove TCE from waste oil; (2) the still manufacturer told Tonka that the still would remove all of the TCE; (3) Tonka's employees reasonably believed that the still removed all of the TCE and were specifically told to observe the still process to make sure all of the TCE had been removed; (4) employees were told to reboil the still oil if it smelled of TCE or if it could be observed; the operator's job was to boil the oil "until there was no more [TCE] in it;" (5) a test of the still oil had confirmed that it contained no TCE; (6) there was no evidence that the still oil in the 1950s smelled of TCE; (7) the detection of TCE in the still oil by test and smell occurred in 1982 because of improper operation of the still; (8) Tonka's manufacturing process "consumed" large amounts of TCE because TCE is volatile at room temperature and a Tonka employee testified that all waste was accounted for in Tonka's disposal records.

that court had not decided a case involving insurance coverage of pollution liability.[5]

III. THE DISTRICT COURT'S DECISION

The district court granted summary judgment against Tonka, without any articulation of the standard for granting summary judgment or discussion of the evidence Tonka submitted. Instead, throughout the opinion, the court arrived at factual conclusions citing only the evidence submitted by the Insurers. And, in an instance where the court did note the existence of evidence Tonka submitted, that evidence was excluded. The court refused to consider Tonka's expert's affidavit regarding the cause of the contamination on the grounds that it did not show a factual basis or support in the record for the opinions and did not satisfy the requirements of Fed. R. Evid. 702 & 703. A-33, n.6.

The court held as a matter of law that Tonka had not used a still to remove TCE from its liquid waste and could be presumed to have known that disposal of TCE-laden waste from the still on the site would cause

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[5]Although courts around the United States were divided on these legal issues, the Eighth Circuit had articulated its antipathy to insurance coverage of pollution damages based on Missouri law. In *NEPACCO*, *supra* at 5, the Eighth Circuit Court of Appeals held that claims for remediation of a polluted site were not "damages" covered by comprehensive general liability insurance policies. *See also Aetna Cas. & Surety Co. v. General Dynamics Corp.*, 968 F.2d 707 (8th Cir. 1992) (pollution exclusion contains a temporal component under Missouri law).

property damage to third persons. The court failed to mention Tonka's evidence that it had always used a still to remove TCE, that it was not aware that Tonka's waste contained TCE, and that it had no knowledge that Tonka's waste disposal method was likely to cause damage to third parties. Finally, the court, in a footnote, indicated that certification was not necessary because "the issues of Minnesota law are clear." A-26, n.4.

IV. THE COURT OF APPEALS' DECISION

Stressing that Tonka was "responsible" for the presence of TCE and other solvents in the groundwater, the Court of Appeals affirmed the trial court's entry of summary judgment. It held that Tonka knew or should have known that waste deposited on the site contained TCE. The appellate court did not mention, much less distinguish or discredit, Tonka's evidence on the material facts. Tonka submitted evidence:

(1) disputing the accuracy of testimony that alleged site disposal occurred in the 1960s and later;[6] and

(2) demonstrating that Tonka's employees in the 1950s, at the time of the disposal, reasonably

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[6]Although not mentioned in the context of the occurrence issue, the court cited testimony regarding the disposal of materials in the 1960s and later. A-8. The court disregarded the contradictory evidence Tonka submitted apparently crediting two witnesses' testimony submitted by the Insurers, and utterly disregarding the testimony of five Tonka witnesses.

believed Tonka's waste did not contain TCE. (*See* note 4, *supra*).

This evidence created a fact issue as to Tonka's knowledge that its waste contained TCE.[7] The court not only failed to mention Tonka's evidence, it appeared to deny that Tonka had even submitted it. A-9.

The court also held that because Tonka allegedly knew that there was a substantial probability that TCE was a "harmful substance," Tonka also "knew or should have known that there was a substantial probability that its on-site dumping of liquid wastes containing TCE and other solvents would cause property damage." A-9. Therefore, the court held, the damage was "expected" as a matter of law.[8] *Id.*

This inference of knowledge contradicted Tonka's evidence that demonstrated that it had no knowledge in the 1950s that disposal of its waste would harm third party property, as well as a decision of another circuit court. In *Smith v. Hughes Aircraft Co.*, 10 F.3d 1448

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[7]The court's conclusion also contradicts the Minnesota Court of Appeals' decision in *Woyke v. Tonka Corp.*, 420 N.W.2d 624, 628 (Minn. Ct. App. 1988) (affirming judgment NOV in favor of Tonka based on lack of proof of knowledge, either actual or constructive, that Tonka's still bottoms contained TCE).

[8]Tonka also asked the Eighth Circuit to certify the case to the Minnesota Supreme Court. Like the district court, it refused.

(9th Cir. 1993), the circuit court reversed a summary judgment for the insurers because in reaching the court's finding that the insured "expected or intended injuries caused by TCE, the district court relied on evidence that TCE was toxic in some concentration if ingested." *Id.* at 1455. The Ninth Circuit pointed out that:

> [U]ntil recently, exposure to moderate amounts of TCE was not considered harmful. TCE was commonly used as an anesthetic and disinfectant. It was also used to extract hops, decaffeinate coffee, and to prepare fish meal. It was not until 1977 that the FDA first proposed banning TCE as a food additive. The first recommended, non-binding TCE standard for drinking water was not promulgated by the EPA until 1979.

Id. Thus, the court concluded, it could not hold that the insured "knew or believed its [disposal of TCE] was substantially certain or highly likely to result" in harm to third parties. *Id.* In contrast, the court in this case based its holding on Tonka's knowledge that TCE should not be breathed. *See* A-34.

As to causation, the court held, without any scientific evidence, that spills and leaks "could not plausibly account" for the high concentrations of TCE in the soil and groundwater. A-9. The court ignored the evidence Tonka submitted to refute the inference that the site disposal caused the contamination of the groundwater, including:

(1) an affidavit of its expert who opined that disposal in the 1950s could not have caused the problem for which Tonka was seeking coverage; and

(2) a report of an investigation of the site by another engineer which concluded that the "alleged waste disposal area is not significantly impacting groundwater quality."

In short, while there was no evidence in the record that supported the court's conclusion that occasional spills could not have caused the contamination, there was evidence in the record that demonstrated that purposeful on-site waste disposal was not the cause.[9]

The only explanation for the court's failure to consider, or even mention Tonka's evidence is that it applied an erroneous standard of review. The court's opinion focused exclusively on whether evidence existed which would support a judgment. Such a legal standard is appropriate only for review of a post-trial judgment which assumes that the district court was the fact-finder.

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[9]The court seems to have adopted a requirement that Tonka need establish the cause of the contamination in order to defeat the inference that it was caused by its 1950s disposal practices. The policies do not require Tonka to prove the cause of an accident in order to obtain coverage. *See Hauenstein v. St. Paul-Mercury Indem. Co.*, 65 N.W.2d 122 (Minn. 1954) (accident is damage from known or unknown cause).

This Court should grant certiorari to review the appellate court's decision, clarify and simplify the standards for summary judgment and articulate the considerations which should guide courts in deciding whether to certify an issue of state law to the state's highest court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THE STANDARDS FOR GRANTING SUMMARY JUDGMENT.

This case raises serious issues involving the interpretation of the Federal Rules of Civil Procedure. Because this Court has a duty of supervision over the federal judiciary, it is important that the Court provide the lower courts with guidance as to the appropriate use of summary judgment to dispose of cases at the pretrial stage. The courts in this case confused the applicable standards and granted summary judgment in the face of numerous material factual issues. Thus, not only did these courts depart from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's power of supervision (*see* Sup. Ct. R. 10.1(a)) but the decisions below constitute a misapplication of the federal rules. *See* Sup. Ct. R. 10.1(c).

In addition, this abuse of the summary judgment procedure denied Tonka its constitutional right to a jury trial. Summary judgment was never intended as a substitute for trial. Yet the court's confusion regarding the standard for summary judgment in this case reflects a growing trend which has dramatically reduced the

scope of the substantive constitutional right to a jury trial. This Court has traditionally held that "[t]he criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven fact has been respected." *Wilkerson v. McCarthy*, 336 U.S. 53, 70-71 (1949). Thus, the Court has jealously guarded inroads on the right to a jury trial. *See, e.g., Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956). The serious departure in this case from the process justice requires warrants this Court's review.

A. Where The Movant Bears The Burden Of Persuasion, The Court Must Determine Whether It Has Established Its Claim With Undisputed Evidence.

The moving party bears the initial burden of proving that summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A district court, in deciding whether the moving party has met this burden, must determine which party bears the ultimate burden of persuasion at trial. *Id.* at 331 (Brennan, J., dissenting.) Justice Brennan's dissenting opinion in *Celotex* suggests that if the party moving for summary judgment also bears the burden of proof, it must support its motion with undisputed material evidence on each element of its claim. *Id.*

In this case, the Insurers, the moving parties, bore the burden of persuasion to prove that the liability for which

Tonka sought coverage was excluded by the policies and they had no duty to defend Tonka. *Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389 (Minn. 1979). In determining whether the Insurers met their burden, the court was required to construe the policy liberally in favor of the insured. *Lanoue v. Fireman's Fund Am. Ins. Co.*, 278 N.W.2d 49 (Minn. 1979).

If the movant successfully establishes a prima facie case, the burden then shifts to the non-movant to show that there is a genuine issue of fact for trial. *Augustine v. GAF Corp.*, 971 F.2d 129, 132 (8th Cir. 1992). The district court must then examine the evidence in the light most favorable to the non-movant, giving that party the benefit of every inference and resolving all factual disputes against the movant. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). The district court must base its determination regarding the presence or absence of a material issue of fact on evidence that will be admissible at trial. *Financial Timing Publications, Inc. v. Compugraphic Corp.*, 893 F.2d 936, 942 (8th Cir. 1990). Only if no reasonable jury could find for the non-movant on the evidence presented should the movant be entitled to prevail without a full trial on the issues. As shown below, neither the trial court nor the appellate court made any effort to evaluate the evidence under these standards.

B. In This Case, The Summary Judgment Standards Were Improperly Applied.

The lower courts improperly entered summary judgment against Tonka in this case as a result of a

fundamental misunderstanding of the requirements of Rule 56. The crucial material fact issue that the Insurers were required to establish before the court could conclude that they owed Tonka no duty to defend under the liability policies was that Tonka knew or should have known at the time of the disposal that disposal of liquid waste on the ground was highly certain to cause the third-party property damage for which it sought coverage. *See Continental W. Ins. Co. v. Toal*, 244 N.W.2d 121, 125 (Minn. 1976). However, summary judgment is particularly ill suited to resolve issues of intent, knowledge, or motivation. James V. Chin, *Clark v. Coats & Clark, Inc.: The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga. L. Rev. 1009, 1021 (1992). These were the precise issues in this case. *See James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 280-81 (Ky. 1991) (state of mind questions raised by intended/expected clause may not be resolved on summary judgment). Recognizing the factual nature of this inquiry in another case involving coverage of pollution damages, the Minnesota Court of Appeals in *Sylvester Bros. Dev. Co. v. Great Central Ins. Co.*, 480 N.W.2d 368 (Minn. Ct. App. 1992), held that it is a question of fact whether an insured should have known that pollution was likely to result from its activities. 480 N.W.2d at 373.

The district court showed no hesitancy, however, in resolving these issues. The court began without even identifying the summary judgment standards it was to apply, other than the requirement that facts and inferences be construed in favor of the non-moving party.

A-24. The court did recognize that the Insurers bore the burden of persuasion, (A-25), but rather than determine from the evidence whether any issues of material fact existed under the relevant evidentiary standard, (*cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)), the court applied a post-judgment analysis. Finding that the Insurers' claims were supported by "substantial evidence," the court simply ignored Tonka's contrary evidence and entered judgment against Tonka. The district court erred because it failed to consider Tonka's evidence, failed to resolve factual disputes in favor of Tonka, and failed to draw inferences from those facts in favor of Tonka.

Like the district court, the Eighth Circuit did not articulate the summary judgment standard or how it applied in this case. It also reiterated the very same factual errors made by the district court. Like that court, it omitted any discussion of Tonka's evidence and why that evidence allegedly created no issues of fact. For example, the court states that Tonka "failed to present hard evidence" to support its claim that Tonka did not know that its waste contained TCE. A-9. In fact, Tonka had introduced "hard evidence" on this point.[10] *See supra*, at note 4. At a minimum, this evidence created a question of fact as to whether Tonka's conduct

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[10]Indeed, because the Insurers bore the burden of proof, summary judgment should not have been granted unless Tonka had conceded the facts upon which the Insurers' motion was based since a jury could well have disbelieved the Insurers' evidence. *See* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?* 63 Notre Dame L. Rev. 770, 781 (1988).

constituted an attempt to "consciously control the risks covered by the policy." *See Bituminous Cas. Corp. v. Bartlett*, 240 N.W.2d 310, 313 (Minn. 1976); *Sylvester Bros., supra.*

The district court's eagerness to grant summary judgment and the Court of Appeals' rush to affirm reflect a fundamental misunderstanding of the summary judgment procedure. On each point on which the court ruled in this case, Tonka had submitted admissible evidence. This evidence was ignored by the court.

This decision not only harms Tonka by denying Tonka its constitutional rights, but it also reflects a judicial willingness, perhaps encouraged by a perceived shift by this Court to a liberal interpretation of Rule 56, to grant summary judgment in inappropriate cases, and to preclude effective review by simply avoiding reference to the legal standards or the evidence.[11] This Court should accept review to reaffirm its adherence to the

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[11]One commentator suggests that as recently as 1979, the Court had remarked that the summary judgment procedure was highly inappropriate to determine fact-intensive issues such as the state of mind requirements which exist in this case. Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 Notre Dame L. Rev. 321, 327 (1989). Since 1986, claims the author, the Court has delineated a substantially new attitude toward summary judgment. *Id.* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudicative Process*, 49 Ohio St. L.J. 95, 159 (1988) (The observed and coming change in summary judgment jurisprudence bodes ill for certain classes of litigants, persons interested in the accuracy of judicial decision making, and the system as a whole.).

constitutional principles which must guide the lower courts, no matter how crowded their dockets. Review by this Court is warranted.

C. This Decision Will Have A Negative Impact On Both The Federal Judicial System And The Individual Litigant.

The Circuit Court's decision in this case will adversely affect not only the many insureds who may be wrongfully deprived of insurance coverage for unintended and unexpected pollution damages until the Minnesota Supreme Court resolves the relevant legal issues, but also every plaintiff. This Court should grant Tonka's petition for certiorari in order to simplify the applicable standards for granting motions for summary judgment and rein back the courts from using the summary judgment procedure to clear their dockets of cases that cannot properly be resolved on a summary basis.[12]

Nearly a decade ago, this Court issued three opinions which considered the standard for granting summary judgment. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty*

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[12]One author describes the lower courts' reaction to *Celotex*, as a backlash or "anti-plaintiff counter-revolution." *See generally*, D. Michael Risinger, *Another Step in the Counter-Revolution: a Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35 (1988); *See also Stempel*, *supra*, at 161 (By making summary judgment easier to obtain, the Court implicitly bestowed a political favor (and greater judicial power) . . . on society's "haves.").

Lobby, Inc., 477 U.S. 242 (1986); *Celotex v. Catrett*, 477 U.S. 317 (1986). In so doing, the Court breathed new life into the summary judgment procedure for disposition of cases. Although the Court denied that it was changing the procedure, the result has been a dramatic increase in the use of summary judgment to dispose of cases.

Unfortunately, the pendulum has swung so far in favor of the pretrial disposition of cases that misapplication of the new summary judgment standards has increasingly deprived litigants such as Tonka of their constitutional right to a trial on disputed fact issues and deprived them of their rights under standards of proof dictated by state law.[13] What has resulted is a flurry of ad hoc decisions and dangerous unpredictability. *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudicative Process*, 49 Ohio St. L.J. 95, 107 (1988).

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[13]In dissent, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), Justice Brennan predicted that the *Anderson* procedure would undermine litigants' constitutional right to a jury trial. Litigants must now engage in a full-blown paper trial on the merits. *Id.* at 261. Similarly, just as Justice Scalia feared in the lower court decision in *Anderson*, courts have interpreted the increased proof requirement at this stage to require the trial court to evaluate the weight of the facts. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1570 (D.C. Cir. 1984). Every time summary judgment is granted where, after an actual trial, directed verdict could not have been, however, there has been a violation of the constitutional right to a jury trial because of a misprediction of the trial record. D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 31, 41 (1988).

The trilogy of cases decided by this Court eight years ago also left in question: (1) the standard to be applied in cases where the movant bears the burden of proof on the substantive issues;[14] (2) where both parties submit evidence, whether the court may weigh the evidence in deciding whether judgment should be entered;[15] and (3) what quality of evidence will be considered in supporting

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[14]Only Justice Brennan in his dissenting opinion remarked upon the proper standard to be applied in such a case. The articulated standards apparently involve the court in an evaluation of the quantity and quality of the evidence unless the non-movant fails to make any effort to respond to the motion.

[15]As pointed out in James V. Chin, *Clark v. Coats & Clark, Inc.: The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga. L. Rev. 1009, 1020 (1992), the courts have also misunderstood *Celotex* with regard to the level of proof required to meet the initial burden:

> [J]udges and commentators have widely interpreted [*Celotex*] as an indication of the Supreme Court's desire to liberalize the use of Rule 56. This perception is one of the problems with *Celotex*. The case seems to allow the moving party to meet its initial burden with a lesser showing than required in *Adickes*. Lower federal courts have uniformly regarded the movant's burden under *Celotex* as satisfied by even a meager showing. These same courts, however, mandate that the non-moving party shoulder a heavy burden to survive summary judgment. Thus, summary judgment has evolved from its originally intended role as guarantor of the existence of material issues for trial into a procedure to "assess the plaintiff's likelihood of prevailing at trial."

Id. at 1020-21.

and opposing summary judgment.[16] This case squarely presents all three issues.

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[16]In this case, the court based its judgment on inadmissible evidence. For example, many of its factual determinations were based on its interpretation of an unauthenticated, unsworn, hearsay memorandum of Tonka's counsel summarizing witness interviews. This memorandum would not have been admissable to prove the truth of the hearsay statements it contained. The court should not be permitted to base summary judgment on inadmissible evidence presented by the moving party. *See* Melissa Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 Hastings L.J. 53, 81-82 (1988).

The court also excluded the affidavit of Tonka's hydrogeologist in which the expert opined that the on-site disposal of materials in the 1950s had not caused the contamination. As noted above, the determination of the source of the contamination was a critical issue. The district court refused to consider the opinion and substituted its own inference as to the source of contamination. Because the expert was qualified and did disclose the factual basis for his opinions it was error for the court not to consider them. *See Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir. 1985); *Monks v. General Elec. Co.*, 919 F.2d 1189 (6th Cir. 1990). Moreover, Tonka should have been permitted to supply missing foundation before the opinion was simply stricken because *Celotex* appears to sanction the use of inadmissible evidence in opposition to a motion for summary judgment if the evidence can be made admissible at trial. *See Celotex*, 477 U.S. at 323. The circuit courts are in disagreement regarding the import of the *Celotex* decision on the admissibility of such evidence. *See Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013, 1015 n.1 (11th Cir. 1987) (requirement that evidence be admissible to defeat summary judgment no longer valid after *Celotex*); *Bushman v. Halm*, 798 F.2d 651, 653 (3d Cir. 1986) (deciding that a letter-report from non-moving party's physician should not have been ignored by the court). *But see Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920 (9th Cir. 1987).

The trial court improperly denied Tonka its constitutional right to a jury trial by resolving fact issues and weighing the evidence. The Court of Appeals compounded this error by failing to apply the proper standards upon review of the entry of summary judgment. Thus, this case reflects what one author has described as an exercise of "discretionary license" to resolve the merits of the case. Martin Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment And Rule 11 Sanctions under the Federal Rules of Civil Procedure*, 67 N.C.L. Rev. 1023, 1036 (1989). The author notes:

> Such flexibility, which amounts to a discretionary license or its functional equivalent, is sometimes desirable, but here it involves judicial power to resolve the merits. Without more appellate guidance and supervision, it could lead to ad hoc, unjust dismissals, as well as to the possibility of judicial overcorrection and backlash. Indeed, many recent opinions granting motions to dismiss or for summary judgment are dangerously slanted in the direction of aggressive interception, ignore or fail to mention the countervailing considerations that formerly commanded the opposite result, and in some cases are alarmingly redolent of supposedly repudiated Code rhetoric. For these reasons, balanced, but unexplicated, doctrine that fails to educate or control lower court judges may create as many problems as it solves.

Id. All of the evils which result from exercising such license are present here: inaccurate conclusions as to the facts based on a superficial or incomplete review of the paper record, a failure to permit the jury to resolve factual issues and ultimately, an erroneous resolution of the legal issues. This Court should grant certiorari to provide guidance to the lower courts, clarifying and resolving the issues which have arisen in the eight years since *Celotex* was decided.

II. THIS COURT SHOULD PROVIDE GUIDANCE TO THE LOWER COURTS REGARDING CERTIFICATION OF ISSUES OF STATE PUBLIC POLICY TO THE STATE'S HIGHEST COURT.

This case presents issues of compelling interest to the State of Minnesota regarding the clean-up of its damaged water resources. Without standards to guide it, the district court failed to certify[17] these public policy issues to Minnesota's highest court. Federalism principles require review by this Court to correct the lower court's error and provide standards for future cases.

This Court has noted that the federal courts can resolve issues about state law by certifying cases for

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[17]The Minnesota Legislature has adopted the Uniform Certification of Questions of Law Act (Minn. Stat. § 480.061) which permits the state supreme court to answer questions "which may be dispositive of the cause then pending in the Certifying Court" and as to which there is no controlling state precedent.

decision to the state court itself. *Salve Regina College v. Russell*, 499 U.S. 225, n.4 (1991). Such a procedure in the long run saves time, energy and resources and helps build a cooperative judicial federalism. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Despite this Court's encouragement of the use of the certification procedure, there is no case law establishing parameters for the exercise of the courts' discretion, and its exercise is effectively without bounds. As a result, cases are certified to the state courts on a haphazard basis and, as in this case, the court may refuse to certify in a case raising significant issues of state public policy properly resolved by a state's highest court.

In rationalizing its refusal to certify these issues in this case, the district court characterized the law as "clear." However, except when this case was before it, the Minnesota Supreme Court had not decided a case involving insurance coverage of pollution liability. Other courts have recognized that the "seemingly simple question" of how the policy language should be interpreted has spawned a profusion of litigation. *Claussen v. Aetna Cas. & Sur. Co.*, 380 S.E.2d 686, 688 (Ga. 1989). Thus, when the district and Eighth Circuit courts interpreted the qualified pollution exclusion in some of Tonka's insurance policies, the courts were unable to cite a single Minnesota Supreme Court decision. Neither court offered any prediction of the Minnesota Supreme Court's position on the issue. In the absence of controlling Minnesota case law, and in a case where the legal issues involved Minnesota public policy,

the court should have certified the issues to the Minnesota Supreme Court.[18]

As a result of the district court's refusal to certify, Minnesota public policy issues were decided by the federal courts. As demonstrated by its decision in *NEPACCO*, the Eighth Circuit's perspective on these issues is directly contrary to the Minnesota Supreme Court's approach as articulated in *3M*, which favors insureds such as Tonka on the environmental coverage issues. Predictably, upon its review of the case, the Eighth Circuit decided all of the legal issues in this case adversely to Tonka without even citing *3M* (which was also the law of this case). The failure of the federal

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[18]To the extent that the failure to certify in this case is deemed proper, the court's failure to analyze Minnesota law on the legal issues was a violation of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Clearly, the Eighth Circuit decision in *Aetna Cas. & Sur. Co. v. General Dynamics Corp., supra* at n.5, construing Missouri law, on which the district court relied had no precedential value and should not have been considered. The court's heavy reliance on intermediate Minnesota court decisions gave more weight to those decisions than would the Minnesota Supreme Court. The Minnesota Court of Appeals is an error-correcting court. *Matter of Welfare of M.D.O.*, 462 N.W.2d 370 (Minn. 1990). Moreover, neither court cited another Minnesota Court of Appeals' decision construing the qualified pollution exclusion in favor of the insured. *See Grinnell Mut. Reins. Co. v. Wasmuth*, 432 N.W.2d 495 (Minn. Ct. App. 1988). While the federal court should consider intermediate state court decisions in attempting to predict how the highest state court would decide an issue, it should not rely solely on them, when there exist other persuasive data that the highest state court would decide otherwise. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

court to certify this case has resulted in a faulty pronouncement of Minnesota law and policy adversely affecting Minnesota citizens.

A. Federalism Principles Require State Courts To Formulate State Policy.

Federalism principles prohibit the federal courts from engaging in state lawmaking in the guise of "interpreting" state law. When a decision in a diversity case involves the application of unsettled state law to public policy issues, the federal court should be required to certify the issue to the state court because a federal judge's prediction of state law in the absence of a dispositive holding of the state supreme court verges on the lawmaking function of the state court. Delores K. Sloviter, *Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1663, 1682 (1992). The law that results is "not found, but made." Benjamin J. Cordozo, *The Nature of the Judicial Process* 113, 115 (1921).

Despite the best efforts of the federal courts to predict the future thinking of state supreme courts on the basis of available data, they guess wrong on many important issues. Sloviter, *supra*, at 1679. Judge Sloviter notes:

> Until corrected by the state supreme court, such incorrect predictions inevitably skew the decisions of persons and businesses who rely on them and inequitably affect the losing federal litigant who cannot appeal the decision to the state supreme court; they may even mislead lower state courts that may be

> inclined to accept federal predictions as applicable precedent.

Id. at 1681. Indeed, some evidence suggests that federal courts have shown a preference for citing federal decisions on state law instead of state decisions at rates approaching pre-*Erie* levels. *Id.* This case reflects this trend.

The unlimited discretion which federal judges employ without any guidance on certification in diversity cases, "appears irreconcilable with the restraint [the courts] have been cautioned to exercise in the abstention cases when state law issues arise." *Id.* at 1682-83. *See also Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943) ("inevitable product" of ruling on state law issue would be "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy"). Thus, in the past this Court has recognized that federalism suffers when federal judges, not selected under the state system and not answerable to its constituency, make state law. The effect of the incursion of federal judges into what are state policy decisions in civil cases is significant because they involve areas of law that define one citizen's rights and obligations vis-a-vis another's, a function traditionally associated with state sovereignty. D. Sloviter, *supra*, at 1682. In this case, what has been decided also involves the rights of the State itself. In cases requiring the application of state public policy to unsettled questions of law, certification where available, is not only appropriate, but required.

B. The Courts' Refusal To Certify Denied Tonka The Application Of Minnesota Public Policy To The Issues.

The lower courts in this case decided that Tonka would be presumed to have intended or expected injury to third parties from the discharge of TCE, regardless of its actual knowledge of the danger of such disposal to third parties. This inference defeated insurance coverage for the resulting damage. The courts' decision rested on a value judgment regarding who should bear responsibility for the remediation of polluted sites. This is a Minnesota public policy question which should be made only by the Minnesota Supreme Court. *See Hatfield v. Bishop Clarkson Memorial Hosp.*, 701 F.2d 1266, 1267 (8th Cir. 1983).

The interest of the State of Minnesota in the outcome of this litigation is direct and substantial. It is the environment of Minnesota that was damaged by the contamination at issue. It is Minnesota that will for years to come have to wrestle with the problems associated with the clean-up of the site and all other such sites. The court's ruling in this case will directly affect the speed and effectiveness of the clean-up of these Minnesota sites. Only a Minnesota court should determine who is responsible to pay for the clean-up and whether it is in the best interests of the State and its citizens to enforce those citizens' rights to insurance coverage for pollution remediation costs.

Certification of the question would have permitted the Minnesota Supreme Court to formulate and apply

Minnesota public policy. Certification is particularly important in this case where the impact of the decision will affect thousands of Minnesota citizens, including policyholders, land owners, taxpayers, insurers, government agencies and the State itself.

This Court should grant Tonka's petition for certiorari in order to clarify its adherence to principles of federalism and provide guidance to lower courts when they are confronted with state court policy questions.

CONCLUSION

Tonka respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

David F. Herr
(Counsel of Record)
Mary R. Vasaly
MASLON EDELMAN BORMAN & BRAND
3300 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

ATTORNEYS FOR PETITIONER,
TONKA CORPORATION

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3187

Bituminous Casualty Corporation,
an Illinois corporation,

Plaintiff - Appellee,

v.

Tonka Corporation, a
Minnesota corporation,

Defendant - Appellant,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

v.

Bituminous Casualty Corporation,
The Travelers Insurance Company,
North River Insurance Company,
Great American Insurance
Company, Industrial Indemnity
Company, Zurich Insurance
Company, United States Fire
Insurance Company, Mission
National Insurance Company,
Twin City Fire Insurance Company,

Counter-Defendants - Appellees.

Submitted: May 10, 1993
Filed: November 12, 1993

Before BEAM, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

LOKEN, Circuit Judge.

Tonka Corporation ("Tonka") appeals the district court's[1] grant of summary judgment declaring that Bituminous Casualty Corporation and several other insurance companies (collectively, "the Insurers") have no duty to defend or indemnify Tonka for its costs incurred in a proceeding initiated by the Minnesota Pollution Control Agency ("MPCA") to remedy groundwater contamination at Tonka's facility in Mound, Minnesota. The district court held that this contamination is not the result of an "occurrence" within the meaning of the Insurers' comprehensive general liability ("CGL") policies, and also is excluded from coverage by the pollution exclusion contained in many of the policies. We affirm.

I.

Tonka manufactured metal toys at the Mound facility from 1955 until 1984. Prior to painting the toys, Tonka removed oil and grease by passing them through a vapor bath of trichloroethylene (TCE), a common solvent. This process generated a liquid waste of TCE and oil. After the 1950's, Tonka recovered the TCE in a still and reused it, leaving residue oil and stillbottom sludge that was stored in 55-gallon drums for disposal.

In 1985, an engineering study revealed that the groundwater surrounding Tonka's plant contains

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[1] The HONORABLE DIANA E. MURPHY, Chief Judge of the United States District Court for the District of Minnesota.

significant concentrations of TCE and other solvents. Acting under the Minnesota Superfund Act, Minn. Stat. Ch. 115B, the MPCA then issued a formal request that Tonka define and implement a remedial action plan to protect the environment from further releases of these hazardous substances. Tonka notified the Insurers and requested that they defend Tonka in this administrative enforcement proceeding. Bituminous and Travelers defended Tonka for over a year, but then commenced this action seeking a declaratory judgment that they have no duty to defend or indemnify under their CGL policies. Tonka counterclaimed for a declaration that each of the Insurers must defend and indemnify the company under those policies.

The CGL policies provide coverage for damages Tonka is legally obligated to pay because of property damage caused by an "occurrence," which is defined as "an accident, including injurious exposure to conditions, which results . . . in bodily injury or property damage neither expected or intended from the standpoint of the insured." Most of the policies issued after 1972 contain a "pollution exclusion," which bars coverage for property damage arising out of the discharge of contaminants or pollutants unless the discharge was "sudden and accidental."

The district court granted the Insurers' motion for summary judgment, concluding that the groundwater contamination resulted from Tonka's "ongoing and routine disposal of TCE on its site," that Tonka "knew or should have known that there was a substantial

probability that this release of TCE would cause property damage," and that the resulting damage was therefore not caused by an occurrence within the meaning of the Insurers' CGL policies. In addition, the court held that coverage is barred under those policies that contain a pollution exclusion because "there was nothing abrupt about the disposal of TCE at the Tonka site."

II.

On appeal, Tonka argues that the district court erred both in granting summary judgment on the fact-intensive issue of whether the property damage in question was caused by an occurrence, and in interpreting the pollution exclusion. We review the district court's decision to grant summary judgment and its interpretation of state law de novo. See Salve Regina College v. Russell, 111 S. Ct. 1217 (1991); Gumersell v. Director, Fed. Emergency Mgt. Agency, 950 F.2d 550, 553 (8th Cir. 1991).

With regard to the pollution exclusion, we have recently held that in order to qualify for the "sudden and accidental" exception to that exclusion under Minnesota law the insured must show that its release of a contaminant was abrupt. See Bureau of Engraving v. Federal Ins. Co., No. 92-2910, slip op. at 5 (8th Cir. Oct. 1, 1993). After careful review of the record, we conclude that the district court correctly held that the pollution exclusion applies to Tonka's release of TCE and other solvents into the groundwater at its plant, and that Tonka's ongoing and routine on-site disposal of these

wastes was not "sudden" as a matter of law. See Sylvester Bros. Dev. Co. Central Ins. Co., 503 N.W.2d 793, 797 (Minn. App. 1993); Krawczewski v. Western Cas. & Sur. Co., No. C3-93-672 (Minn. App. Oct. 5, 1993). Accordingly, the district court properly granted summary judgment declaring that Tonka's claims are not covered under any policy containing the pollution exclusion.

However, not all the policies at issue contain a pollution exclusion. Therefore, like the district court, we must also address the "occurrence" issue. The question is whether the contamination of the groundwater under Tonka's plant resulted in property damage "neither expected nor intended from the standpoint of the insured." This is an objective standard; it turns upon whether the damage "should have been expected" by the insured. Bituminous Cas. Corp. v. Bartlett, 240 N.W.2d 310, 313 (Minn. 1976). Under Minnesota law, "the word "expected' denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions." Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 720 (8th Cir. 1981). This standard "involves a higher degree of certainty than reasonable foreseeability." Sylvester Bros. Dev. Co. v. Great Central Ins. Co., 480 N.W.2d 368, 372 (Minn. App. 1992). See also Continental Western Ins. v. Toal, 244 N.W.2d 121, 125 n.3 (Minn. 1976).

The Insurers presented substantial evidence that Tonka is responsible for the presence of TCE and other solvents in the groundwater under its plant. Tonka routinely

dumped liquid wastes on site during the 1950's, before it installed a still to recover TCE. In later reports to the environmental agencies, Tonka described these wastes as "degreaser oils," "still-bottom sludges," and "degreasing solvents. Moreover, Tonka's dumping of liquid wastes on-site did not end upon installation of the still. An employee testified that he dumped barrels of liquid waste in the Tonka parking lot in 1978 because it saved the company $500 per barrel in disposal costs. Another employee testified that he regularly dumped stillbottom sludge and a mixture of TCE and water in the same parking lot, practices that continued from the 1960's until the plant was closed. Tonka knew or should have known that these wastes contained TCE -- employees testified that the barrels of stillbottom sludge smelled like TCE, and Tonka later admitted to the EPA that samples of its stillbottom sludge contained TCE. Throughout this period, despite Tonka's efforts to recover and reuse TCE, its plant operations consumed hundreds of thousands of gallons of the chemical each year.

The Insurers also presented evidence that Tonka knew or should have known that dumping these liquid wastes would likely cause property damage. Tonka's employees were well aware that exposure to TCE and other solvents "could kill you." Two employees testified that Tonka's dumping killed trees on the site. Studies in the 1950's and earlier reported hazards involved with TCE, and a Tonka employee recalled receiving warnings from management at that time to be very cautious with barrels containing the chemical.

Tonka argues that there are genuine fact issues concerning whether it knew the liquid wastes it dumped on site contained TCE and whether the TCE contamination might have been caused by accidental spills. However, we agree with the district court that Tonka failed to present hard evidence to support these hypotheses. There was no evidence that Tonka ever reported any accidents or spills to the MPCA or its insurers, and several Tonka supervisors testified that they were unaware of any TCE spills at the plant. The isolated spills that Tonka was able to document could not plausibly account for the high concentrations of TCE in the soil and groundwater at the site.

Tonka also argues that there is a genuine fact issue an to whether it knew that TCE would harm the environment. However, we think the summary judgment record fully supports the district court's resolution of this issue:

> The full effects of TCE were not documented,, nor did governmental regulations cover TCE, until some time after Tonka's on-site TCE disposal in the 1950's. The record establishes, however, that Tonka knew at the time of its disposal that there was a substantial probability TCE was a harmful substance.

In these circumstances, we agree with the district court that Tonka knew or should have known that there was a substantial probability that its on-site dumping of liquid wastes containing TCE and other solvents would cause property damage. Therefore, the damage that did result

was "expected" as a matter of Minnesota law, and there was no covered "occurrence" under the Insurers' policies. See Farmers Union Oil Co. v. Mutual Serv. Ins. Co., 422 N.W.2d 530, 533 (Minn. App. 1988) (no coverage for damage to crops resulting from a known misapplication of herbicide because the damage was "expected"); Bartlett, 240 N.W.2d at 313-14 (no duty to defend claim against contractor when the damage caused was "highly expectable from his standpoint"); Sage Co. v. Insurance Co. of No. Amer., 480 N.W.2d 695, 697-98 (Minn. App. 1992) (no duty to defend wrongful termination claim because the termination was "expected, intended, and designed"). Likewise, the Insurers have no duty to defend Tonka in the MPCA proceeding -- "there is no duty on the part of the insurer to defend 'when it is established by the insurer that the facts are such that there is no coverage under the policy for any resulting liability.'" State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421, 424-25 (Minn. 1984).

We have carefully considered Tonka's other contentions and find them to be without merit. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-87-392

Bituminous Casualty Corporation,
Plaintiff,

v.

Tonka Corporation,
Defendant and
Counterclaimant,

v.

MEMORANDUM
OPINION AND ORDER

Bituminous Casualty Corporation,
Travelers Insurance Company,
North River Insurance Company,
Great American Insurance Company,
Industrial Indemnity Company,
Zurich Insurance Company, United
States Fire Insurance Company,
Fireman's Fund Insurance Company,
Mission National Insurance Company,
and Twin City Fire Insurance
Company,
Additional Defendants
on Counterclaim.

Filed AUG 24 1992
Francis E. Dosal, Clerk

Thomas E. Peterson, Esq., Peterson & Hektner, 8400 Normandale Lake Boulevard, Minneapolis, MN 55437, appeared for plaintiff and counterclaim defendant.

Mary R. Vasaly, Esq., and Mallory K. Mullins, Esq., Maslon Edelman Borman & Brand, 3300 Norwest Center, Minneapolis, MN 55402, appeared for defendant and counterclaimant.

Sean E. Hade, Esq., Jardine Logan & O'Brien, 2100 Meritor Tower, St. Paul, MN 55101, appeared for counterclaim defendant Twin City Fire Insurance Company.

Paul G. Niemann, Esq., Moss & Barnett, 4800 Norwest Center, Minneapolis, MN 55402, appeared for counterclaim defendant Travelers Insurance Company.

Leon R. Erstad, Esq. and Robert Kelly, Esq., Erstad & Riemer, 1000 Northland Plaza, 3800 West 80th Street, Minneapolis, MN 55431, appeared for counterclaim defendants North River Insurance Company, United States Fire Insurance Company, and Industrial Indemnity Company.

Donald A. Lane, Esq., Keating Muething & Klekamp, 1800 Provident Tower, One East 4th Street, Cincinnati, OH 45202, and David N. Lutz, Esq., Bowman & Brooke, 150 South 5th Street, Suite 2600, Minneapolis, MN 55402, appeared for counterclaim defendant Great American Insurance Company.

Edward D. Rickert, Esq., Pope & John, 311 South Wacker Drive, Chicago, IL 60606, and Garrett E. Mulrooney, Esq., Maun & Simon, 2300 World Trade Center, 30 East 7th Street, St. Paul, MN 55101, appeared for counterclaim defendant Zurich Insurance Company.

Barbara A. Burke, Esq., Cousineau McGuire & Anderson, 600 Travelers Express Tower, 1550 Utica Avenue South, Minneapolis, MN 55416, appeared for counterclaim defendant Mission National Insurance Company.

Gay B. Urness, Esq., Mahoney Dougherty & Mahoney, 801 Park Avenue, Minneapolis, MN 55404, appeared for counterclaim defendant Fireman's Fund Insurance Company.

This case involves issues of insurance coverage for costs incurred related to environmental damage. As a result of claims made by the Minnesota Pollution Control Agency (MPCA), Tonka Corporation (Tonka) has paid certain sums, and it seeks to hold its insurers responsible for them and for future related costs. The insurers are Bituminous Casualty Company, The Travelers Insurance Company, North River Insurance Company, Great American Insurance Company, Industrial Indemnity Insurance Company, Zurich Insurance Company, United States Fire Insurance Company, Fireman's Fund Insurance Company, Mission National Insurance Company, and Twin City Fire Insurance Company (collectively, "insurers").

Bituminous Casualty Company commenced this action seeking a declaratory judgment that it owes nothing on its policies. Tonka counterclaimed for a declaration of coverage, joining the other nine insurers as additional defendants on the counterclaim. Now before the court is the motion by the insurers for summary judgment on all of the claims brought by Tonka, on the basis that the

various liability insurance policies provide no coverage for the claims asserted against them.[2]

I.

Tonka manufactured metal and plastic toys at its main facility in Mound, Minnesota, from 1955 until 1983. The manufacturing process required that the toys be degreased before they were painted. Tonka sprayed the solvent trichloroethylene (TCE) on the toys to remove the grease and oil. TCE is the primary pollutant involved in this case. The TCE was delivered to Tonka in barrels

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[2]The proposed order submitted by the insurers with their motion would also grant summary judgment to plaintiff Bituminous on all claims contained in its complaint, as well as dismissing all of Tonka's claims against the insurers. Tonka does not dispute the scope of the proposed order, for the claims are interrelated.

With their reply brief, the insurers moved for sanctions against Tonka pursuant to Fed.R.Civ.P. 37 and to strike the affidavit testimony of Tonka's expert witness Gary Hokkanen. The insurers also moved to shorten the time period under the local rules so these motions could be heard on the same date as their summary judgment motion. The court declined to expedite hearing on these motions.

The motion for sanctions should be denied. This case has involved a number of hotly contested discovery disputes. The important point at this stage in the proceedings is that the delayed discovery has been produced by Tonka and was available to be considered in the motions now before the court. Under all the circumstances, sanctions would not be appropriate.

For reasons stated later, the motion to strike the affidavit should now be dismissed as moot.

and was then pumped into a vat adjacent to the degreaser machine.

After the toys were sprayed, the oil and TCE would collect at the bottom of the degreaser. Tonka originally removed this waste and stored it in 55 gallon drums. In 1962 or 1963, a new degreaser was installed containing a still which could separate the TCE from the waste oil. TCE has a lower boiling point than oil, so it could be evaporated leaving oil at the bottom of the still. The vaporized TCE was condensed and reused. The waste oil was removed and stored in 55 gallon drums.

It is undisputed that during the 1950's, Tonka disposed of some liquid waste on its site. On February 22, 1983, in response to a Request of Information from the United States Environmental Protection Agency (EPA), Tonka described its waste disposal practices at its Mound facility as follows:

> Information available to Tonka, consisting of oral histories of past and present employees, does not provide specific information on the types nor the quantities of waste disposed of at the site. The waste material most likely disposed of at this site would have been degreaser oil and solvents. Transport and disposal was likely done by Tonka employees and may have involved the opening of barrels and depositing of the waste on the ground. We believe that disposal at this site may have occurred for less than one year.

Insurers' Joint Brief, Exhibit 47, at 002582-83.

Although the parties dispute details of the disposal, documents produced at the end of June 1992 by Tonka show that TCE waste was emptied onto the Tonka site. These documents consist of a summary of employee interviews by Tonka's counsel from February 1983. They indicate that liquid wastes, some of which included TCE, were dumped at the Tonka site, as Tonka disposal truck drivers from the time testified. For example, one employee stated that the Mound site

> was used for disposal of various [sic] wastes for about three years [sic] between [sic] 1954 and 1957. The amount disposed of ranged from about one to ten barrels per month. The disposal would have included TCE sludge (oils), sludge from the stripping operation, and solvents.

Insurers' Reply Brief, Appendix B, Exhibit 3 at 2.

Discovery has not shown that the contamination at the Tonka site was caused by any accidental spills of TCE. Tonka officials testified that they had no knowledge of any accidental spills. Tonka's insurance broker testified that there was never a loss or claim because of any spills or problems with vats or tanks. Barr Engineering found no evidence of tank leakage, and there is no record support for the proposition that TCE ever leaked from the vat. According to Tonka, a former employee, Clyde Wallin, testified that some TCE once spilled while the TCE supplier pumped it into the vat at some unspecified time after he began employment with Tonka in 1962.

One Tonka supervisor, Norman Venske, stated that there were accidental spills of TCE from the degreasing machine which were immediately cleaned up, but may have overflowed into the sewers. The engineering reports indicate, however, that groundwater contamination was not due to TCE in the sewers, but that disposed of on land.

In approximately 1960, Tonka started using outside firms to perform waste removal. They took the waste off site to dumps in the area. One Tonka employee, Theodore Woyke, testified that he tipped waste barrels containing solvents and waste oil on their sides in the Tonka site west parking lot from 1967 until 1983, as directed by his supervisor. According to Tonka, Woyke is a former employee who is biased against Tonka and who won damages in a suit against Tonka commenced in 1983 for damage to his farm based on contamination of its soil from barrels of waste oil he took home.

In 1979, Tonka installed a 1,000 gallon tank in the facility to collect waste oil. TCE was discovered in the tank in 1982. The MPCA cited Tonka for violations in its waste management procedures. Thereafter, Tonka retained engineers to perform tests on the waste oil from the degreaser. The first test showed 95% TCE concentration; the second 62% concentration. According to Tonka, all waste from the tank was disposed of off site as hazardous waste. The Mound plant was closed in 1983 when Tonka moved its operations to Texas.

On June 9, 1981, Tonka filed "Notification of Hazardous Waste Site" forms with the EPA. According to Tonka, this filing was made in its effort to comply with the new "Superfund" regulations. According to the insurers, Tonka investigated its waste disposal practices after the MPCA had begun to look into complaints about the practices. In any event, Tonka acknowledged that liquid waste had been discharged on the site in the late 1950's, and that it may have disposed of hazardous materials on site between 1954 and the early 1960's.

Tonka does not dispute that in 1981, the Metropolitan Waste Control Commission (MWCC) found that TCE was being discharged into the sanitary sewer serving the Tonka site.

In June 1984, Tonka was notified that a well inadvertently placed on its property by the City of Mound had disclosed the existence of groundwater contamination. Tonka retained counsel in response, who hired Barr Engineering to investigate. In September 1984, MPCA monitoring wells found TCE and other solvents in the groundwater under the Mound site. The MPCA issued a formal "Request for Initial Investigation" (RFII) on February 5, 1985 with respect to the contamination.

In its September 1985 report, Barr Engineering found two areas of groundwater contamination: one under the parking lot on the west end of the plant, the other around the old TCE holding tank on the north end of the plant. The pollution in the former area is migrating slowly to the southwest toward wetland tributaries to Cooks Bay

of Lake Minnetonka and Langdon Lake; the pollution in the latter area is migrating slowly northeast toward Harrison Bay of Lake Minnetonka. The MPCA ordered further monitoring of the groundwater with a series of wells. Tonka supplies the MPCA with annual data on the groundwater pollutants. The MPCA has not ordered further action by Tonka, nor has Tonka taken any clean-up actions.

Tonka notified several insurers of the MPCA's claims in June 1985, and others in August 1987. Bituminous commenced this declaratory judgment action in 1987. Tonka counterclaimed and brought third party claims against the other insurers, seeking a declaration of rights under each policy and to recover expenses and legal fees.

Tonka acknowledges that throughout the period of its operations in Mound, it knew that TCE should not be breathed by workers, and states that it took appropriate precautions. It states that TCE was not recognized as a potential carcinogen until the mid-1970's, however, and that no regulations governed its disposal until May 1980. According to the insurers, Tonka knew of TCE's toxicity in the 1950's and took precautions to protect its workers. They say Tonka knew then that TCE should not be dumped into the environment.

The insurers present three arguments why summary judgment should be granted in their favor. They argue that the response costs at the Tonka Mound facility do not fall within any of their grants of coverage because no "accident" or "occurrence" took place. In particular,

they contend that Minnesota law employs an objective standard for determining whether damages resulting from an insured's conduct are expected or intended; under this standard, the undisputed fact of Tonka's intentional dumping in the 1950's and beyond, for which Tonka knew or should have known the possible environmental consequences, precludes coverage. The insurers also argue that all counterclaims should be dismissed because Tonka's claims are barred by the "owned property" or "care, custody and control" exclusions in their policies. Tonka's claims concern costs incurred solely at Tonka's own site, under its control. Finally, the insurers argue that Tonka's claims do not amount to covered "damages" because the costs were purely preventive and monitoring measures, not costs necessary to effectuate clean-up of contamination such as would constitute damages.

As an alternative to dismissing Tonka's counterclaims in their entirety, the insurers argue that coverage is precluded under the terms of certain particular policies. Several policies bar coverage for discharge of pollutants unless the discharge was both "sudden" and "accidental." One policy (Fireman's Fund, 1986-87) contains an absolute pollution exclusion.[3] Two others (Travelers and United States Fire) contain specialized pollution exclusions which apply here, they say.

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[3]Tonka does not include this policy in its discussion of coverage. Tonka recently reached agreement with Fireman's Fund to settle its claims against it.

The insurers also argue that coverage would be barred for certain time periods. They contend that Tonka would not be entitled to coverage for any payments made or costs incurred prior to its request for coverage from its insurers, i.e. 1985 or 1987, depending on the policy. Tonka made voluntary payments until this time, and the insurers were prejudiced by lack of notice. The insurers also contend that coverage would be barred under each policy issued after the date Tonka knew or should have known of the contamination at its site. Coverage does not extend to a harm known prior to a policy's inception.

Tonka responds that the key issue is damage to groundwater, not discharge of TCE on Tonka land. It argues that there is no evidence that it intended or expected to contaminate the groundwater, and that it has presented evidence to dispute whether it discharged TCE upon its property intentionally. It contends that the standard is subjective, not objective; that is, the relevant determination is whether there is a high degree of certainty that it had the actual mental state of intent or expectation to pollute the groundwater, which it did not. A subjective standard promotes fulfillment of the reasonable expectations of the parties. Tonka asserts that the drafting history of the policies shows that the insurers intended to exclude only damage which was subjectively expected or intended by the insured. Tonka argues that the "owned property" exclusion does not preclude coverage because the Minnesota Supreme Court determined, on a question certified to it for this case, that property damage has occurred. The damage to groundwater is third-party damage, and Tonka's costs

have been incurred in responding to the MPCA's orders protecting the state's interest in the groundwater.

Tonka contends that the qualified pollution exclusion in some policies does not apply because the release of TCE was "sudden and accidental." The release was unexpected and unintended: the onset was sudden like an illness which suddenly appears but may last for years. Tonka argues that the language of the exclusion is ambiguous, so that the drafting history and the insurance industry's prior interpretations of the language are relevant evidence. This history shows the industry intended to provide blanket protection for unintended damages, including pollution. Tonka also contends that each particular policy provides coverage despite some variations in language.

Tonka argues that its notice to the insurers was adequate and that they have not met their burden of showing they suffered actual prejudice from late notice. The "voluntary payment" exclusion should not be interpreted to eliminate the requirement of actual prejudice. Tonka contends that "known risk" and "loss in progress" doctrines have not been adopted in Minnesota, and even if they were the law, they should not be applied here because the loss was groundwater contamination, for which Tonka was not identified as a potentially responsible party until February 1985, a date after the inception of all the policies at issue.

Finally, Tonka states that the issues raised by this motion should be certified to the Minnesota Supreme

Court since state law is uncertain and the issues are of great public importance.

In a separate brief, Bituminous argues that there is no evidence of property damage occurring within its policy periods sufficient to trigger coverage. It agrees with Tonka that the damage here is groundwater contamination, which may have occurred during the policy period, but the damage was not known or manifested until after the policy had been cancelled. Tonka responds that what triggers coverage is not discovery of injury, but injury-in-fact. Here contamination of the groundwater is alleged by the MPCA to have continued throughout all the insurers' policy periods; it is irrelevant that it was not discovered until later. Other insurers, United States Fire, North River, and Industrial Indemnity, disagree with Bituminous on this point. They argue that the court does not need to determine the trigger of coverage issue at this time; but if the court does, it should adopt the injury-in-fact standard, not the manifestation of injury standard recommended by Bituminous.

III.

On a motion for summary judgment, all material facts and inferences are construed in favor of the non-moving party. AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir. 1987). To defeat a motion for summary judgment, however, the non-moving party must show through specific evidence that there are material facts in dispute creating a genuine issue for trial; it may not rest

only upon the allegations or denials of its pleadings. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

Tonka's counterclaim against the insurers seeks a declaration that its costs incurred in responding to the MPCA are covered by the relevant policies. Although the MPCA has not brought a traditional civil lawsuit against Tonka, a possible duty to defend was triggered by the MPCA's actions here. "Surely the legal proceedings commenced by MPCA against the insured[] is equally coercive as a civil judgment against the. insured." Minnesota Mining & Mfg. Co. v. Travelers Indem. Co., 457 N.W.2d 175, 183 (Minn. 1990). Furthermore, the damage to groundwater under the Tonka site is property damage which potentially triggers the duty to defend, even if the costs to date are only for monitoring the extent of the contamination. The monitoring wells and studies implemented by Tonka at the behest of the MPCA are not "purely preventive measures" which are not damages. Id. at 184. The wells and studies arise from the - actual property damage and involve potential remedial measures.

An insurer's duty to defend is contractual in nature and is ordinarily determined by examining the allegations of the complaint and the policy coverage. Prahm v. Rupp Constr. Co., 277 N.W.2d 389, 390 (Minn. 1979). An insurer contesting coverage has the burden of proving the nonexistence of coverage. Id.

This case does not fit the ordinary model in that there is no complaint, only directives from the MPCA to

Tonka. The MPCA alleges that the groundwater is contaminated and that Tonka released hazardous substances into the groundwater. The requirements imposed by the MPCA on Tonka are not premised on whether Tonka's TCE disposal was negligent, reckless, or intentional.

The ordinary rule is that the insurer is obligated to defend if any part of the cause of action against the insured arguably is covered by the policy. Bituminous Cas. Corp. v. Bartlett, 240 N.W.2d 310, 312 (Minn. 1976), overruled on other grounds, Prahm v. Rupp Constr. Co., supra. "However, the complaint is not controlling when actual facts clearly establish the existence or nonexistence of an obligation to defend." Id., 240 N.W.2d at 312. When the insurer challenges whether the complaint alleges an "accident" or "occurrence" within the meaning of the policy, "the nature of the cause of action is separately determined to decide if it constitutes an insured occurrence, independent of the way the claim is characterized in the underlying lawsuit." Farmers Union Oil Co. v. Mutual Serv. Ins. Co., 422 N.W.2d 530, 533 (Minn. Ct. App. 1988), citing Bituminous Cas. Corp., supra, 240 N.W.2d at 312.

The policies at issue in this case define the terms "accident" and "occurrence" in the same way as the terms are usually defined in Minnesota case law.[4] The

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[4]Tonka's request to certify the issues raised in this motion to the Minnesota Supreme Court should be denied. The issues (continued...)

definitions are not ambiguous. Ambiguity in an insurance policy is a question of law to be decided by the court. Columbia Heights Motors, Inc. v. Allstate Ins. Co., 275 N.W.2d 32, 34 (Minn. 1979); see also St. Paul Fire and Marine Ins. Co. v. Federal Deposit Ins. Corp., No. 91-2656, slip op. at 10 (8th Cir. July 2, 1992). Although any ambiguity in the language of the policy must be construed in favor of the insured, the court "has no right to read an ambiguity into the plain language of an insurance contract in order to construe it against the insurer." Henning Nelson Constr. Co. v. Fireman's Fund Am. Life Ins. Co., 383 N.W.2d 645, 652 (Minn. 1986) (citations omitted). The relevant language in the policies at issue here is not ambiguous.[5]

Under the policies, an accident is "an unexpected, unforeseen, or undesigned happening or consequence

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[4](...continued)
of Minnesota law are clear on this motion and do not require certification, unlike the question which was certified by this court on October 20, 1988 in this case (the question related to what constitutes "damages" under the policies; it was answered on June 8, 1990).

[5]During the development of this case, the court permitted Tonka to undertake discovery concerning the drafting history and intentions of the parties in relation to the policies at issue. At that time, the legal question of ambiguity in policy language was not directly before the court, and the court wanted to provide Tonka with every opportunity to develop its case. The question of ambiguity is now squarely presented. The drafting history and other parole evidence are not relevant to the interpretation of these unambiguous policies.

from either a known or unknown cause." Hauenstein v. St. Paul-Mercury Indem. Co., 65 N.W.2d 122, 126 (Minn. 1954); see Bituminous Cas. Corp. v. Bartlett, supra, 240 N.W.2d at 310. After November 1, 1958, the grants of coverage in all policies issued to Tonka were occurrence based. An occurrence is "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage neither expected nor intended from the standpoint of the insured." Sage Co. v. Insurance Co. of No. Am., 480 N.W.2d 695, 698 (Minn. Ct. App. 1992).

Under Minnesota law, the expectation of the insured is considered from an objective point of view.

> For the purposes of an exclusionary clause in an insurance policy the word "expected" denotes that the actor knew or should have known that there was a substantial probability that certain consequences will result from his actions. The results cease to be expected and coverage is present as the probability that the consequences will follow decreases and becomes less than a substantial probability.

Sylvester Brothers Dev. Co. v. Great Central Ins. Co., 480 N.W.2d 368, 372 (Minn. Ct. App. 1992), quoting Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 720 (8th Cir. 1981). "The standard is viewed as an objective standard that involves a higher degree of certainty than reasonable foreseeability." Id.

The objective standard for determining an insured's expectation underlies the Minnesota view that reckless acts on the part of the insured may preclude a duty to defend by the insurer because there was no "accident" or "occurrence." In Bituminous Cas. Corp. v. Bartlett the Minnesota Supreme Court held that a contractor's intentional or reckless failure to conform to building specifications was not an "occurrence" covered by a comprehensive general liability insurance policy. The court stated:

> A construction contractor's liability policy is designed to protect him from fortuitous losses occurring in connection with his work. If property damage occurs because of mistake or carelessness on the part of the contractor or his employees, he reasonably expects that damage to be covered. On the other hand, the insurer is in the business of distributing losses due to such property damage among a large number of policyholders. It is able to properly set premiums and supply coverage only if those losses are uncertain from the standpoint of any single policyholder. If the single insured is allowed through intentional or reckless acts to consciously control the risks covered by the policy, a central concept of insurance is violated.

Id., 240 N.W.2d at 313 (footnote omitted). The court noted that defects in workmanship were clear and had been called to the contractor's attention during the course of construction. "Therefore, any damage from them should have been expected by him." Id. That this

damage was expectable meant that it did not constitute an "occurrence" as a matter of law. The court reversed a declaratory judgment for the insured and held: "The absence of any occurrence clearly precludes coverage. Therefore, there is no obligation to defend." Id. at 314.

Bituminous was followed under different circumstances in Farmers Union Oil Co., supra. In that case, a farmer asked Farmers Union, an agricultural cooperative, to spray his corn crop with a certain pesticide. The cooperative knew that the pesticide was not approved by the EPA for use on corn. But having been assured by the farmer that a particular method of application would make the pesticide safe for his corn, the cooperative agreed to spray. The corn was damaged; and the farmer sued the cooperative. The cooperative tendered the complaint to its insurer, who declined to defend on the basis that there was no "occurrence" triggering coverage within the terms of the policy. The court affirmed judgment for the insurer. It noted that the cooperative intended no damage of any sort to the farmer's corn crop. The cooperative was reckless in spraying, however, for it "knew of the substantial risks involved, proceeded in light of this knowledge, and disregarded the known hazard." Id., 422 N.W.2d at 533. Based on this recklessness, and in the absence of any subjective intent to cause damage, the court held that there was no "occurrence" and the insurer did not have a duty to defend.

Similarly, in Sage Co. v. Insurance Co. of No. Am., supra, the court affirmed summary judgment for the

insurer that it had no duty to defend. A real estate partnership fired one of its apartment building managers claiming she was not satisfactorily performing her duties. She sued for age discrimination. The partnership tendered the complaint to its insurers, which declined to defend on the grounds that there was no "occurrence" within the meaning of the policies. The court held that the insurers "have met their burden of proving the nonexistence of coverage as a matter of law." Id., 480 N.W.2d at 697. The termination was not an occurrence because it was intentional. It was not relevant whether the partnership intended the particular harm alleged by the building manager, namely age discrimination. There was no duty to defend because it was clear the partnership intended the termination, which resulted in the alleged harm. See also League of Minnesota Cities Ins. Trust v. Coon Rapids, 446 N.W.2d 419 (Minn. Ct. App. 1989) (no duty to defend because pollution exclusion in policy precluded coverage for toxic by-product of Zamboni ice cleaning machine).

In the present case, the undisputed material facts show that Tonka's ongoing and routine disposal of TCE on its site precludes coverall as a matter of law. Tonka may not have known all the dangers of TCE at the time, and may not have specifically intended to contaminate the groundwater. But Tonka's role in causing the harm through its disposal practices means that its costs are not due to an "accident" or "occurrence" under its policies.

The undisputed facts establish that Tonka knowingly released TCE in the 1950's through recurring dumping

on its site. This is shown not only by the affidavit and deposition testimony submitted by the insurers, but also by Tonka's own representations to the EPA and MPCA. For example, Dale Heitz, one of Tonka's truck drivers from 1956 through 1958, testified:

> Q. When you got to wherever it was that you were going to empty these barrels of waste, would you open the bung holes to accomplish the emptying, or would you get the tops off in some fashion?
>
> A. Open the bungs and let them run.
>
> Q. Would you remain there until the barrel was empty, or would you come back later and pick them up?
>
> A. I didn't unload them from the truck. Just tipped them over and let it run off the back end.

Heitz depo. at 35. Another example is Tonka's report to the EPA describing how Tonka employees would dispose of barrels of solvents at the Tonka site by opening the barrels and depositing the contents on the ground. This method of disposal was not isolated but routine during that time period.

Tonka raises various hypotheses about possible accidental spills, leaks, and spills during delivery.[6] Tonka's submissions are mere conjecture, however. Wallin's affidavit about spills during supply is so vague about time as to be meaningless in this context. There is nothing in the record to support the hypothesis of leaks from vats. Venske is quick to point out Tonka's excellent response to accidental spills, and stated at his deposition that at most the spills ran off into the sewers -- but there is no evidence that the groundwater contamination at issue here came from the sewers. On the contrary, the record shows that the TCE leached through the Tonka land. The location of the TCE in the groundwater found by Barr Engineering correlates with the insurers' evidence concerning on-site disposal in the 1950's. Tonka did not dispose of TCE accidentally.

The record also establishes that Tonka knew or should have known that there was a substantial probability that this release of TCE would cause property damage. Two Tonka employees, Al Hilk and Carl Krause, reported that the dumping of barrels on the Tonka site resulted in trees

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[6]Tonka also presents the affidavit of an expert, Hokkanen, who opines that the contamination was caused by spills and leaks rather than the intentional dumping in the 1950's. The insurers have moved to strike this affidavit on procedural grounds and for lack of foundation.

The affidavit does not create an issue of material fact since it does not show a basis or support in the record for its opinions. The affidavit is thus insufficient under Fed.R.Ev. 702 & 703. Because of this determination the motion to strike is moot.

dying. Insurers' Reply Brief, Appendix B, Exhibit 3 at 5. Lloyd Laumann, hired to work in the shipping department in 1955, testified that he helped move barrels including TCE in the 1950's. He was aware that "we had to be very cautious" with the barrels. Laumann depo. at 29. Sometime during 1958, Laumann recalled receiving warnings from management about TCE. Id. at 31.

Studies in the 1950's, and earlier, reported hazards involved with TCE, including four deaths of workers by inhalation at degreasing operations. Insurers' Joint Appendix 3, Exhibit M at 45. This report is confirmed by experiences at Tonka. Floyd Weinzierl, a paint department employee, testified that when cleaning out the degreasers, he would let them air out first because, "You couldn't breathe in there otherwise. It [the TCE vapors] would kill you." Weinzierl depo. at 75. See also Wallin depo. at 26 (worker passed out from TCE vapors); Heitz depo. at 188 (in 1958 knew TCE "could kill you if you got too much of it"). The full effects of TCE were not documented, nor did governmental regulations cover TCE, until some time after Tonka's on-site TCE disposal in the 1950's. The record establishes, however, that Tonka knew at the time of its disposal that there was a substantial probability TCE was a harmful substance.

Under these circumstances, the damages caused by the TCE, including those sought by Tonka here, cannot be recovered under the terms of the policies. These harms do not fall within the grant of coverage of the insurance policies for an accident or occurrence.

This conclusion is similar to that reached in Bureau of Engraving v. Federal Ins. Co., Civ. 3-89-517 and Civ. 3-90-673 (D. Minn. June 3, 1992) (Magnuson, J.). That case involved barrels of hazardous waste buried at five sites in Isanti County, Minnesota, which was later found to have contaminated soil and groundwater. The contamination had been caused by leaks from the barrels. The insured argued that it did not know the buried substances were hazardous, nor did it subjectively believe that they were, nor had government regulations identified them as hazardous at the time it disposed of them. The court held that it was irrelevant whether the insured knew or believed that the substances were hazardous, or whether government regulations had identified them as such. The insured's liability was for damage caused by leakage of contaminants from the barrels, and the leakage constituted the release or discharge of the contaminants. This release was not accidental, hence there was no coverage.[7]

In Bureau of Engraving, the insured did not intend to pollute or specifically to contaminate groundwater. It only intended to bury the barrels. That intent to bury was the critical intent, not the intent to pollute. Similarly, while Tonka no doubt had no specific intent to

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[7]Bureau of Engraving involved the qualified pollution exclusion, whether release was sudden and accidental, not whether there was an accident or occurrence. However, Tonka itself argues that the pollution exclusion merely restates the extent of coverage provided by the definition of accident or occurrence. The same reasoning applies in each context.

pollute the groundwater, it knowingly and intentionally disposed of TCE in such a fashion that damage was a substantial probability, damage later discovered to involve groundwater. Under Minnesota law, Tonka may not hold its insurers liable to defend against the MPCA proceedings concerning groundwater contamination, nor for associated clean-up costs.

In addition, there is no liability to Tonka under the policies which contain a pollution exclusion denying coverage for a discharge unless it is both "sudden and accidental." The term "accidental" has already been discussed. "Sudden," the other term, "in the context of the policies carries the temporal connotation of 'abruptness.'" Sylvester Brothers Dev. Co. v. Great Central Ins. Co., supra, 480 N.W.2d at 375. This definition is not ambiguous. Id. at 376; see also Aetna Cas. and Surety Co. v. General Dynamics Corp., No. 91-2252, slip op. at 4-5 (8th Cir. July 6, 1992) (applying Missouri law but reviewing law in various jurisdictions involving identical policy language).

There was nothing abrupt about the disposal of TCE at the Tonka site. According to Tonka's submission to the EPA, disposal of degreaser oil and solvents on its site occurred for a period less than one year. Tonka's employees indicated in interviews that the disposal took place routinely from 1954-57. Under either scenario, the release of the pollutant at issue in this case was not sudden as defined in the policies and under Minnesota law. The "sudden and accidental" exception to the pollution exclusion contained in policies in this case does

not apply to the claims for which Tonka seeks coverage. Thus, the pollution exclusion applies and precludes coverage under those policies which contain it.

IV.

All the claims and counterclaims in this case have been resolved. Summary judgment should be entered for the insurers, and dismissing Tonka's counterclaims.[8] The unambiguous language of the insurance policies precludes the coverage Tonka seeks, and Minnesota law provides that in the absence of any accident or occurrence there is neither a duty to defend nor to indemnify. This result is consistent with Minnesota policy concerning the purposes of insurance and the concern that control of the risks not be within the sole province of the insured. See Bituminous Cas. Corp. v. Bartlett, supra. Because of this resolution other issues raised by the parties need not be addressed.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

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[8]Any crossclaims among insurers are thus rendered moot. The crossclaim brought by Travelers Insurance Company against Fireman's Fund was recently dismissed without prejudice by stipulation of the parties; Travelers also asserted crossclaims against the other insurers.

1. the motion for summary judgment by counterclaim defendants is granted and the claims of counterclaimant Tonka Corporation are dismissed;

2. the motion for summary judgment by plaintiff is granted as to its claims against Tonka Corporation;

3. the motion brought by counterclaim defendants to shorten the time period to hear their motion for sanctions and to hear their motion to strike the affidavit of expert witness Gary Hokkanen is denied;

4. the motion brought by counterclaim defendants for sanctions is denied;

5. the motion brought by counterclaim defendants to strike the affidavit of expert witness Gary Hokkanen is dismissed as moot;

6. all crossclaims among counterclaim defendants are dismissed as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 21, 1992

/s/ Diana E. Murphy
Diana E. Murphy
United States District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3187MNMI

Bituminous Casualty Corporation, an Illinois corporation,	*	
Appellee,	*	
vs.	*	Appeal from the United States District Court for the Northern District of Iowa
Tonka Corporation, a Minnesota corporation,	*	
Appellant,	*	
vs.	*	
Bituminous Casualty Corporation, et al.,	*	
Appellees.	*	

The petition for rehearing by the panel is denied.

December 21, 1993

Order Entered at the Direction of the court:

/s/ Michael Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Minn. Stat. § 480.061
Uniform Certification of Questions of Law

Subdivision 1. Power to answer. The supreme court may answer questions of law certified to it by the supreme court of the United States, a court of appeals of the United States, a United States district court, a United States bankruptcy court, or the highest appellate court or the intermediate appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

Subd. 2. Method of invoking. This section may be invoked by an order of any of the court referred to in subdivision 1 upon the court's own motion or upon the motion of any party to the cause.

Subd. 3. Contents of certification order. A certification order shall set forth

(a) the questions of law to be answered; and

(b) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Subd. 4. Preparation of certification order. The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and

forwarded to the supreme court by the court administrator of the certifying court under its official seal. The supreme court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the supreme court, the record or portion thereof may be necessary in answering the questions.

Subd. 5. Costs of certification. Fees and costs shall be the same as in civil appeals docketed before the supreme court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Subd. 6. Briefs and argument. Proceedings in the supreme court shall be those provided in rules of the court.

Subd. 7. Opinion. The written opinion of the supreme court stating the law governing the questions certified shall be sent by the clerk of the court to the certifying court and to the parties and shall be res judicata as to the parties.

Subd. 8. Power to certify. The supreme court or the court of appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court

that there are not controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Subd. 9. Procedure on certifying. The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Subd. 10. Uniformity of application and construction. This section shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this section among those states which enact it.

Subd. 11. Citation. This section may be cited as the uniform certification of questions of law act.

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this

rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse he application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Supreme Court, U.S.
FILED
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No. 93-1491

In the

Supreme Court of the United States

October Term, 1993

TONKA CORPORATION,
a Minnesota corporation,

Petitioner,

v.

BITUMINOUS CASUALTY CORPORATION,
THE TRAVELERS INSURANCE COMPANY,
NORTH RIVER INSURANCE COMPANY,
GREAT AMERICAN INSURANCE COMPANY,
INDUSTRIAL INDEMNITY COMPANY,
ZURICH INSURANCE COMPANY,
UNITED STATES FIRE INSURANCE COMPANY,
MISSION NATIONAL INSURANCE COMPANY,
TWIN CITY FIRE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Sean E. Hade
Counsel of Record
JARDINE, LOGAN & O'BRIEN
2100 Piper Jaffray Plaza
444 Cedar Street
Saint Paul, Minnesota 55101-2160
(612) 290-6500

Counsel for Respondent
Twin City Fire Insurance Company

1994 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

18 pp

Thomas E. Peterson, Esq.
PETERSON & HEKTNER LTD.
Suite 1475
8400 Normandale Lakes
Boulevard
Minneapolis, Minnesota 55437

Attorney for Respondent
Bituminous Casualty Company

Paul G. Neimann, Esq.
MOSS & BARNETT
4800 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota
55402-4119

Attorney for Respondent
The Travelers Insurance
Company

Leon R. Erstad, Esq.
ERSTAD & RIEMER, P.A.
950 Northland Plaza
3800 West 80th Street
Minneapolis, Minnesota 55431

Attorney for Respondents
North River Insurance Company,
Industrial Indemnity Company,
United States Fire Insurance
Company

Donald A. Lane, Esq.
KEATING, MUETHING
& KLEKAMP
1800 Provident Tower
One East Fourth Street
Cincinnati, Ohio 56202

Attorney for Respondent
Great American Insurance
Company

Robert J. Bates, Esq.
BATES & MECKLER, LTD.
8300 Sears Tower
2300 South Wacker Drive
Chicago, Illinois 60606

Attorney for Respondent
Zurich Insurance Company

Barbara M. Burke
COUSINEAU McGUIRE
& ANDERSON
600 Travelers Express Tower
1550 Utica Avenue South
Minneapolis, Minnesota
55416-1523

Attorney for Respondent
Mission National Insurance
Company

RULE 29.1 STATEMENT

Respondent Twin City Fire Insurance Company's parent company is Hartford Fire Insurance Company, which is owned by ITT Hartford Insurance Group.

Respondent Bituminous Casualty Corporation is a subsidiary of Bitco, which is owned by Old Republic International Group.

Respondent The Travelers Insurance Company is owned by The Travelers Inc. (formerly Primerica Corp., successor to The Travelers Corporation) Associated Madison Companies, Inc. and The Travelers Insurance Group Inc. its' subsidiaries are Commercial Credit Company, Smith Barney Shearson Holdings Inc., and Travelers Mortgage Securities Corporation.

Respondent Great American Insurance Company is one of the Great American Insurance Companies, a subsidiary of American Financial Corporation.

Respondent Zurich Insurance Company is a member of the Zurich-American Insurance Group its' parent company is Zurich Insurance Company of Switzerland.

Respondent Mission Insurance Companies Trust, Trustee California Insurance Commissioner was formerly known as Mission National Insurance Company was a subsidiary of Mission Insurance Group.

Respondents U.S. Fire Insurance Company, Industrial Indemnity Insurance and North River Insurance Company parent companies and subsidiaries are: Xerox Corp., Xerox Financial Services, Inc., Crum & Forester, Inc., International Ins. Co., Seaboard Underwriters, Inc., Seaboard Underwriters Agency, Inc., Premier Ins. Co., International Marine Underwriters of New England,

Inc., Crum & Forester Underwriters of Ohio, Crum & Forester Insurance Company (Bermuda) Ltd., Westchester Fire Ins. Co., Mt. Airy Ins. Co., Star Ins. Co., Industrial Indemnity Co., Viking Ins. Co. of Wisconsin, Viking General Agency, Inc., Viking Mutual Ins. Co., Richard Whiley, Inc., International Surplus Lines Ins. Co., Crum & Forester Managers Corp. (Fla.), Savings Ins. Exchange Group Agency, Inc., Crum & Forester Benefit Managers Corp., Home Underwriters, Inc., The Savings Ins. and Retirement Plan Group, Inc., Financial Ins. Management Agency, Inc., Industrial Underwriters Ins. Co., All West Ins. Co., Industrial Ins. Co. of Hawaii, Ltd., Industrial Indemnity Co. of Alaska, Industrial Indemnity Co. of the Northwest, California Ins. Co., Industrial Indemnity of Idaho, CALPAC Holding Co., Inc., CALPAC Ins. Co. Ltd., Claremont Holdings, Ltd., Claremont Ins., Ltd., Constitution Reins. Corp., Constitution Reassurance S.A., Constitution Management Corp., The London Agency, Inc., Floyd West & Company, and Commonwealth Lloyd's Ins. Co.

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In the
Supreme Court of the United States
October Term, 1993

No. 93-1491

Tonka Corporation,
a Minnesota corporation,

Petitioner,

v.

Bituminous Casualty Corporation,
The Travelers Insurance Company,
North River Insurance Company,
Great American Insurance Company,
Industrial Indemnity Company,
Zurich Insurance Company
Mission National Insurance Company,
Twin City Fire Insurance Company,

Respondents,

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

RESPONDENTS JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves the straightforward interpretation of standard form insurance policies sold by Respondents ("the Insurers") to Petitioner, Tonka Corporation ("Tonka"), from the 1950s until 1986. The policies provide coverage for unexpected, unintentional "accidents" or "occurrences" only. Some of the policies contain exclusions for "occurrences" involving the release, escape or dispersal of pollutants when such releases are "sudden or accidental."

In 1981, Tonka learned that storm sewers at its plant site ("the Site") in Mound, Minnesota contained elevated levels of trichlorethylene ("TCE"), a solvent that Tonka had used to degrease toys it manufactured at the Site. In 1984, the State of Minnesota notified Tonka that a monitoring well on its property showed the presence of TCE in the groundwater at the Site. Thereafter, Tonka voluntarily agreed to monitor the contamination and notified the Insurers of a claim under the policies.

Bituminous Casualty Corporation filed this declaratory judgment action for the purpose of obtaining an order that no coverage existed under the policies it issued to Tonka. Tonka counterclaimed against Bituminous and made third-party claims against the rest of the Insurers for coverage.

Both the district court and the court of appeals found that TCE was present in the groundwater because of Tonka's practice of intentionally dumping degreaser wastes containing TCE on the ground at the Site. The courts both held, therefore, that Tonka had failed to produce the requisite evidence to refute the conclusion that no covered "accident" or "occurrence" had taken place as required by the policies. The courts also held that the various pollution exclusions applied to Tonka's claims since the releases of TCE were not sudden and accidental.

A petition for writ of certiorari should not be granted in this case. The case does not involve novel issues. The courts below were merely called upon to engage in routine contract interpretation pursuant to state law. The district court, as affirmed by the court of appeals, properly applied the summary judgment standard enunciated by this Court to these contract issues. In addition, the issues addressed by the lower courts were not the type which should have been certified to the Minnesota Supreme Court since they involve well settled principles of insurance policy interpretation under Minnesota law. In sum, none of the standards set forth in Supreme Court Rule 10.1 are present in this case, and Tonka's Petition should be denied.

II. The District Court Decision

The Insurers moved for summary judgment before the district court citing Tonka's routine practice of disposing of TCE waste on the ground at the Site.

The Insurers asserted that Tonka had failed to prove an "accident" or "occurrence" under the policies. In addition, the Insurers argued that the "sudden and accidental" pollution exclusions applied to Tonka's claim because of these facts.

The district court agreed. The district court cited the summary judgment standards pronounced by this Court in the seminal case of Celotex Corp. v. Catrett, 477 U.S. 317 (1986) and correctly interpreted this case as requiring Tonka to "show through specific evidence that there are material facts in dispute creating a genuine issue for trial..." The district court then reviewed the evidence presented by the Insurers in their Motion, including evidence regarding Tonka's intentional dumping of TCE at the Site during at least the 1950s,[1] evidence concerning Tonka's undisputed knowledge of the dangers of TCE during this

[1] The district court also recognized that at least one employee testified that Tonka dumped waste oil on the property as late as 1983.

period and evidence regarding the presence of TCE in the waste degreaser oil which was dumped on-site. The court also recognized that Tonka had failed to present sufficient evidence to refute the Insurers' evidence that Tonka's dumping of wastes resulted in groundwater contamination.

After properly interpreting Minnesota law which holds that the policy terms "accident" and "occurrence" are unambiguous and must be interpreted by an objective standard, the court reviewed the above evidence and held that Tonka had failed to provide evidence of a covered claim as a matter of law. The court also held that Tonka had failed to produce the necessary evidence of a "sudden or accidental" release of pollutants and was, therefore, denied coverage under the pollution exclusions in the relevant policies.

III. The Court of Appeals Decision

The court of appeals agreed with the district court that Tonka had failed to produce sufficient evidence to withstand summary judgment on the "accident" or "occurrence" issues.

The court of appeals recognized the objective standard associated with these policy terms and held that no coverage exists in Minnesota where the insured "knew or should have known" that its actions would result in certain consequences, citing Auto-Owners Ins. Co. v. Jensen, 667 F.2d 714, 720 (8th Cir. 1981).

With this standard in mind, the court of appeals reviewed the record before the district court and concluded that the undisputed evidence showed the following:

1. Tonka routinely disposed of hazardous waste on the ground at the Site during the 1950s and perhaps as late as 1978.

2. Tonka knew or should have known that the hazardous waste from its' manufacturing operation contained hazardous substances.

3. Tonka knew or should have known that its' hazardous substances or industrial waste products could harm the environment.

The court of appeals reviewed the evidence submitted by Tonka and agreed with the district court that this evidence failed to create a material dispute. The court correctly concluded that the evidence submitted did not create a material dispute about the intentional nature of the hazardous waste discharges.

Finally, the court, citing its recent decision in Bureau of Engraving v. Federal Ins. Co., 5 F.3d 1175 (8th Cir. 1993), summarily held that the pollution exclusions in some of the policies applied to the damage arising from Tonka's "ongoing and routine" disposal of hazardous waste as a matter of law.

REASONS FOR NOT GRANTING THE WRIT

I. THE COURT SHOULD NOT ATTEMPT TO FURTHER CLARIFY THE SUMMARY JUDGMENT STANDARD BY GRANTING CERTIORARI IN THIS CASE.

A. The Summary Judgment Standard Is Well-Established and Needs No Further Clarification.

In 1986, this Court issued three decisions which established the standard to be applied to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). That trilogy of

cases "breathed new life into summary judgment practice." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989); see also William W. Schwarzer et al., The Analysis and Decision of Summary Judgment Motions, 139 F.R.D. 441, 445 (1991). Specifically, Anderson, Celotex and Matsushita signaled the lower courts to set aside the disfavor with which they had long viewed motions for summary judgment and to recognize summary judgment as a useful tool for "weeding out frivolous lawsuits and avoiding wasteful trials." 10A Charles A. Wright et al., Federal Practice & Procedure: Civil 2d § 2727 (Supp. 1994). To that end, the Celotex opinion expressly stated that summary judgment procedure "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." 477 U.S. at 327.[2]

Contrary to Tonka's contentions, there is no indication that the lower courts misunderstood the summary judgment standard in this case.[3] Moreover, Tonka has failed to demonstrate that

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[2] This is not a good case for discussing the denial of the right to a jury trial. Neither Tonka nor any of the other parties named in the petition ever demanded a jury trial in this declaratory judgment action. To the extent that the Court wishes to address that issue, it should do so in a case where that issue is clearly implicated and has been discussed by the lower courts.

[3] Tonka unfairly chastises the lower courts for failing to detail the summary judgment standard that they employed in this case and improperly accuses the district court of using a "post judgment analysis." Cert. Petition at 16-17. The chief judge of the district court clearly, though briefly, set forth the appropriate standard in her Memorandum Opinion and Order. Appendix to Cert. Petition at A-24 - A-25. Though the Eighth Circuit opinion does not specifically lay out the summary judgment standard, the discussion in the opinion of Tonka's failure to raise a genuine issue of material fact demonstrates that the Eighth Circuit applied the proper standard when it affirmed the judgment of the district court. Id. at A-9. Further, other decisions demonstrate that the Eighth Circuit understands and applies the appropriate summary judgment

other courts are confused about the proper standard to be applied to summary judgment motions. Tonka's fervent desire to avoid the application of well-settled Minnesota law simply cannot justify the complete abrogation of Rule 56 which Tonka champions in its Petition.

II. CERTIFICATION TO THE STATE SUPREME COURT WAS UNNECESSARY.

A. THE LOWER COURTS APPLIED SETTLED STATE LAW.

In a diversity case, a federal court applies the substantive law of the forum state. Recognizing that Minnesota's substantive law was clear, Chief Judge Murphy applied it without certification as have other courts in this district.[4] The established substantive law of Minnesota does not favor petitioner's position. Petitioner's complaint that certification to the Minnesota Supreme Court was necessary[5] is without merit. It is unnecessary for this Court to review the lower courts judicial discretion.

Use of the certification process is not obligatory. Salve Regina College v. Russell, 449 U.S. 225 n. 4 (1991), citing Lehman Brothers v. Schein, 416 U.S. 386, 390-391 (1974). Its use rests in the sound discretion of the federal court. Id.

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standard. See, e.g., Miller v. U.S. Dep't of Agric., 13 F.2d 260, 262 (8th Cir. 1993); Gregory v. City of Rogers, Ark., 974 F.2d 1006, 1010 (8th Cir. 1992); Hartnagel v. Norman, 953 F.2d 394, 395-96 (8th Cir. 1992).

[4] See ie., Bell Lumber & Pole Co. v. U.S. Fire Ins. Co., ___ F.Supp. ___ (1994 WL 96753 (D.Minn. 1994))(J. Doty); and Bureau of Engraving v. Federal Ins. Co., 793 F.Supp 209 (D.Minn. 1992)(J. Magnuson).

[5] Petitioner fails to note that it has never brought a Motion for Certification. See, Minn. Stat. §480.061 Subd.2. (1990). In essence, Petitioner now complains that the district court and the appellate court failed to do what it has never done.

Certification to determine the meaning of the phrase "sudden and accidental" found in the standard pollution exclusion was unnecessary. State law had been established on point. The Erie Doctrine[6] requires federal courts to apply the same state law that would be applied if the case arose in state court. See, 19 Charles A. Wright et al., Federal Practice & Procedure §4507 (1982). If this case had arisen in state court, the state court would have applied the same established law that was applied against the petitioner by the federal district court.

The Minnesota Court of Appeals had published[7] three decisions directly on point addressing the pollution exclusions issues Tonka sought to have certified to the Minnesota Supreme Court. Each of these appellate decisions was followed by a petition for review, all of which were subsequently denied review by the Minnesota Supreme Court.[8] See Krawczewski v. The Western Casualty & Surety Co., et al, 506 N.W.2d 656 (Minn.Ct.App. 1993), pet. for rev. denied (1993); Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 503 N.W.2d 793

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[6] Based on Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[7] The court of appeals may publish only those decisions that: (1) establish a new rule of law; (2) overrule a previous court of appeals' decision not reviewed by the supreme court; (3) provide important procedural guidelines in interpreting statutes or administrative rules; (4) involve significant legal issues; or (5) would significantly aid in the administration of justice. Unpublished opinions of the court of appeals are not precedential. See Minn. Stat. §480A.08 subd.3 (c) 1990.

[8] The supreme court may grant review of any decision of the court of appeals upon the petition of any party. In determining whether to grant such a petition, the supreme court should take into consideration whether the question presented is an important one upon which the court has not, but should rule, whether the court of appeals has decided a question in direct conflict with an applicable precedent of the supreme court, or whether the lower courts have so far departed from the usual course of justice as to call for an exercise of the court's supervisory powers. See, Minn. Stat. §480A.10 Subdivision 1.

(Minn.Ct.App. 1993), pet. for rev. denied (1993); and Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368 (Minn.Ct.App. 1992), pet. for rev. denied (1992).

It is well established that where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. West v. American Tel. & Tel. Co., 311 U.S. 223, 236-237 (1940); See also, Hicks v. Feiock, 485 U.S. 624, 630 (1988).

The district court correctly characterized Minnesota case law as "clear". The district court and the appellate court recognized their duty and applied existing state law. Had this case arisen in state court, the outcome would not have changed. See ie., Dakhue Landfill v. Employers Ins., 508 N.W.2d 798 (Minn. Ct. App. 1993); City of Maple Lake v. American States, 509 N.W.2d 399 (Minn. Ct. App. 1993). Certification of this case was unnecessary. The district court and the appellate court properly exercised sound judicial discretion.

B. PUBLIC POLICY WAS NOT A PROPER ISSUE FOR CONSIDERATION.

This was a simple insurance coverage case involving the application of facts to the insurance contracts. In Minnesota, the interpretation and construction of an insurance policy is a matter of law. Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 503 N.W.2d 793, 795 (Minn.Ct.App. 1993), pet. for rev. denied (1993), citing Iowa Kemper Ins. Co. v. Stone, 269 N.W.2d 885, 887 (Minn. 1978).

The petitioner incorrectly asserts that the resolution of these contract interpretation issues mandates public policy considerations. The Minnesota Supreme Court, in an insurance coverage case, has stated that public policy considerations more

properly bear on the issue of contract validity than contract interpretation. Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 215 n.6 (Minn. 1984).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Sean E. Hade
(Counsel of Record)
JARDINE, LOGAN & O'BRIEN
2100 Piper Jaffray Plaza
444 Cedar Street
St. Paul, Minnesota 55101-2160
(612) 290-6500
ATTORNEY FOR RESPONDENT
TWIN CITY FIRE INSURANCE COMPANY

Supreme Court, U.S.
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(3)

No. 93-1491

In the
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TONKA CORPORATION,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

David F. Herr, Esq.
Counsel of Record for Petitioner
Mary R. Vasaly, Esq.
Maslon Edelman Borman & Brand
3300 Norwest Center
Minneapolis, Minnesota 55402
(612) 672-8200

1994 — Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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No. 93-1491

In The
Supreme Court of the United States
October Term, 1993

Tonka Corporation, a Minnesota corporation,

Petitioner,

-v.-

Bituminous Casualty Corporation, The Travelers Insurance Company, North River Insurance Company, Great American Insurance Company, Industrial Indemnity Company, Zurich Insurance Company, United States Fire Insurance Company, Mission National Insurance Company, Twin City Fire Insurance Company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

INTRODUCTION

Tonka Corporation ("Tonka") submits this Reply Brief (1) to respond to arguments raised in Respondents' Joint Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br."); and (2) to provide the court with a recent decision issued by the Minnesota Court of Appeals which demonstrates that the lower federal courts failed to apply Minnesota law.[1]

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[1]Respondents, Bituminous Corporation, et al. (the "Insurers"), have erred in their Statement of the Case. The Insurers assert that the State of Minnesota discovered groundwater contamination beneath Tonka's plant. In fact, the City of Mound placed monitoring wells on Tonka's property for the purpose of measuring ground water contamination in an adjacent site. When elevated levels of contaminants were detected in 1984, the city notified Tonka and Tonka, in turn, notified the State of Minnesota of the problem. The MPCA issued a Request for Response Action ("RFRA") which required Tonka to investigate and monitor contamination at the site. The Minnesota Supreme Court has specifically held, in this case, that amounts expended to remedy injury to the state's resources in response to a RFRA are damages covered by comprehensive general liability policies. *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 183 (Minn. 1990).

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL COURTS REQUIRE GUIDANCE AS TO THE APPLICATION OF THE SUMMARY JUDGMENT STANDARD

Tonka's Petition for Certiorari is based on the need for this Court to clarify and refine the summary judgment standard.[2] *See* Petition for Certiorari at 13-24. Tonka also seeks review to rectify a specific injury to its constitutional rights as an individual litigant. In response, the Insurers simply state, without any support, that the standards for granting summary judgment are clear and the courts below applied them. Resp. Br. at 5. Thus, the Insurers ignore the controversy in the courts over the difficulty in applying the summary judgment standard announced eight years ago and the implications of doing so. *See* Jeffrey W. Stempel, *A Distorted Mirror: the Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudicative*

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[2]The Insurers erroneously claim that this case is not set for jury trial. One of the parties has demanded a jury trial. Appendix to Tonka's Reply Brief ("RA-") 20. Tonka is entitled to rely on this party's demand in obtaining a jury trial. *In re N-500L Cases*, 691 F.2d 15 (1st Cir. 1982).

Process, 49 Ohio St. L.J. 95, 107 (1988). Courts around the country require guidance in resolving issues which have arisen since *Celotex* was decided. These issues are as general as how to determine how much evidence the movant must produce to establish its right to judgment (*see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), Brennan J., *dissenting*, at 332) and as specific as what quality of evidence may be considered by the court upon a summary judgment motion (*Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013 (11th Cir. 1987)).

With respect to the specific application of the standard to Tonka, the Insurers acknowledge that the Eighth Circuit failed to articulate the summary judgment standard and how it applies in this case. Ins. Br. at 6, n. 3. Indeed, as Tonka's brief demonstrates, the lower courts ignored the summary judgment standard, weighing and resolving the material fact issues rather than determining if genuine issues of material fact exist. *See* Petition at 15-17.

The Insurers argue, however, that any misapplication of the standard in this case may be ignored because the court has properly articulated the standard in other cases. Resp. Br. at 7, note 3.[3]

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[3]These cases highlight the confusion in the lower courts. For example, *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, -- U.S. --, (continued...)

That the Eighth Circuit may articulate the current standard does not demonstrate that it is able properly to apply it. As Tonka demonstrated in its Petition, there is a compelling need for this Court to clarify and guide the lower courts regarding the disposition of cases by summary judgment. This case presents the opportunity for this Court to exercise its supervisory powers and provide the needed guidance to the lower courts. The writ should be granted.

II. THIS COURT SHOULD ESTABLISH STANDARDS FOR CERTIFICATION

The Insurers' argument that certification of the case to the state court was unnecessary is based on two erroneous premises. First, the Insurers' argument that the trial court applied "settled" state law ignores the fact that there existed no Minnesota Supreme Court decision on point (except *Minnesota Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175 (Minn. 1990), which was a case decided

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[3](...continued)
113 S. Ct. 1265 (1993), affirming summary judgment *en banc* with five judges dissenting, demonstrates that judges sitting in the same circuit disagree over application of the summary judgment standard. Moreover, the courts cannot measure the delivery of justice by calculating an average. That other litigants may obtain a fair result does not ameliorate the violation of constitutional rights in this case.

in favor of Tonka but ignored by the lower courts). Second, the Insurers focus upon the pollution exclusion issue, failing even to address the intended/expected exclusion which was the primary issue on which the court decided the case and as to which the trial court and court of appeals made a policy determination which should only be made by Minnesota courts.

A. Tonka Sought Certification In The Lower Court.

As a preliminary matter, the Insurers' claim that review is unnecessary because Tonka failed to bring a motion for certification below is false. *See* Resp. Br. at note 5. Minn. Stat. § 480.061 provides that the Minnesota Supreme Court's jurisdiction may be invoked by a court order from any federal court issued upon motion of a party. Tonka requested certification in the district court (*see* District Court opinion at note 4 (Appendix to Petition for Certiorari at A-26). Tonka also moved the Eighth Circuit for certification. That motion was denied on September 28, 1993. *See* RA-2.

B. The Insurers Have Ignored The Issue.

As noted in Tonka's petition, the trial court erred by formulating state public policy in the guise of "interpreting" the "intended/expected" language of the

insurance contracts. The courts below adopted an inference of intent which rested on public policy grounds. The lower courts not only ignored Minnesota law on this issue, they decided the issue in a way which was directly contrary to Minnesota's interests as articulated in *Minnesota Mining, supra.*

Unable to justify the lower courts' error, or to cite Minnesota precedent which would support the decision below, the Insurers' brief ignores it. The important Minnesota public policy issues inherent in this case required certification to the state court. This Court should accept review in order to articulate clear standards, consistent with federalism principles, for certification of issues to the state courts when there exist no applicable state court decisions.

C. Minnesota Law Is Not "Settled."

As noted above, the Insurers have created a red herring by ignoring the crucial legal issue Tonka raised in its Petition. Focusing solely on the pollution exclusion (on which some law from the Minnesota intermediate appellate court does exist), they argue that the lower courts properly interpreted the pollution exclusion and applied it to the facts. Even as to this legal issue the Insurers are clearly wrong.

In arguing that the law is clear in Minnesota, the Insurers cite three landfill cases. The lower courts

relied on these same decisions.[4] *See* A-36 (District court relies on *Sylvester Bros. Dev. Co. v. Great Central Ins. Co.*, 480 N.W.2d 368 (Minn. Ct. App. 1992) and a Missouri case) and A-6 (Eighth Circuit relies on *Sylvester Bros.* and *Krawczewski v. Western Casualty & Sur. Co.*, 506 N.W.2d 656 (Minn. Ct. App. 1993), and its own decision in *Bureau of Engraving*).[5]

In a very recent decision, however, the Minnesota Court of Appeals rejected the analysis of the pollution exclusion contained in these cases. In *SCSC Corp. v. Allied Mutual Ins. Co.*, No. C2-93-

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[4]The Insurers also state that other courts in this district agree that Minnesota law is clear. Resp. Br. at 7, n. 4. These decisions, also issued by the Minnesota district court, illustrate the federal court's tendency to rely on its own decisions interpreting Minnesota law, rather than state court precedent. The only Minnesota case upon which these courts rely is *Sylvester, supra. See Bureau of Engraving v. Federal Ins. Co.*, 793 F. Supp. 209 (D. Minn. 1992), *aff'd*, 5 F.3d 1175 (8th Cir. 1993), (citing *Sylvester*), and *Bell Lumber & Pole Co. v. United States Fire*, No. 4-89-931, 1994 U.S. Dist. LEXIS 3484 (D. Minn. Mar. 21, 1994) (*citing, Sylvester, Bureau of Engraving*, and *Tonka*).

[5]The Minnesota Supreme Court's denial of review in these cases has no precedential value. In *L.K. v. Gregg*, 425 N.W.2d 813, 815 (Minn. 1988), the court noted specifically that denial of review "is not to be construed as an expression of our approval of either the result or its supporting rationale." *Id.*

1408, 1994 Minn. App. LEXIS 388 (Minn. Ct. App. Apr. 26, 1994), the Minnesota Court of Appeals affirmed a jury verdict in favor of the insured in a case involving contamination of groundwater below the insured's business premises. In its opinion, the Minnesota court held that the determination of the relevant "release" of a pollutant as defined in the landfill cases does not apply in cases not involving landfills. The *SCSC* decision illustrates that the law in Minnesota is not "settled" particularly in non-landfill cases such as the case now before this Court.

The federal court's decision in this case will encourage forum-shopping by parties who view a federal forum as more favorable than a state court forum not only with respect to summary judgment motions generally but also with respect to the substantive issue of insurance coverage for pollution liability. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U.L. Rev. 369, 438-40 (finding that defendants shop forums for liberal summary judgments.) The avoidance of such forum shopping and the equitable administration of the laws were the aims of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *See Hanna v. Plumer*, 380 U.S. 460 (1965). The courts below should have certified this case to the Minnesota Supreme Court to permit that court to consider Minnesota policy in resolving the legal issues presented.

D. The Federal Court May Not Make State Law.

The Insurers' contention that a court's resolution of contract interpretation issues cannot involve state public policy ignores the function of the judiciary in the legal system. *See Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) (discussion of "reasonable expectations" doctrine and policy reasons supporting it."). The Minnesota Supreme Court regards the question of interpretation of insurance contracts covering cleanup of the states' groundwater as involving state public policy issues. *Minnesota Mining*, 457 N.W.2d 175 (Minn. 1990). The division among the states as to whether the policy language is or is not ambiguous and may be "interpreted" by the court demonstrates that in these close cases, the issues involve political decisions.

The decision in this case will directly impact Minnesota and its citizens. The determination whether insurance will be available to assist the clean up of Minnesota's water resources affects both large and small insureds, those who are able to pay for the clean up regardless of reimbursement by insurers and those who are not. The issue in this case is whether a federal court may decide issues of state public policy. Without guidance from this Court as to the parameters of the decision whether to certify a case to the state court, the federal courts will continue to

make state law and state policy. This Court should grant certiorari in order to provide the guidance federalism requires.

CONCLUSION

Tonka respectfully requests that its petition for a writ of certiorari be granted. In the alternative, Tonka requests that the court vacate the opinion below and certify the case to the Minnesota Supreme Court.

Respectfully submitted,

David F. Herr
(Counsel of Record)
Mary R. Vasaly
MASLON EDELMAN BORMAN & BRAND
3300 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4140
(612) 672-8200

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1) Order dated September 28, 1993 denying Tonka's motion for certification — RA-2

2) Reply to Counterclaim dated March 3, 1988 — RA-3

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3187MNMI

Bituminous Casualty Corp., etc., et al.,	*	
Appellees,	*	Appeal from the United States
vs.	*	District Court for the District of
Tonka Corporation, etc.,	*	Minnesota
Appellant.	*	

Appellant's motion for certification or, in the alternative, stay of the proceedings has been considered by the Court and is hereby denied.

September 28, 1993

Ordered Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 93-1491

In The
Supreme Court of the United States
October Term, 1993

Tonka Corporation, a Minnesota corporation,

Petitioner,

-v.-

Bituminous Casualty Corporation, The Travelers Insurance Company, North River Insurance Company, Great American Insurance Company, Industrial Indemnity Company, Zurich Insurance Company, United States Fire Insurance Company, Mission National Insurance Company, Twin City Fire Insurance Company,

Respondents.

REPLY TO COUNTERCLAIM
OF TONKA CORPORATION

Counter-defendant, FIREMAN'S FUND INSURANCE COMPANY ("FFIC"), by its undersigned attorneys, replies to the allegations of the counterclaim of the Defendant/Counterplaintiff, TONKA CORPORATION ("Tonka"), in accordance with the numbered paragraphs therein, as follows:

PARTIES

1. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1".

2. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "2".

3. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3".

4. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "4".

5. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "5".

6. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "6".

7. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "7".

8. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "8".

9. FFIC admits the allegations contained in paragraph "9".

10. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "10".

11. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "11".

12. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "12".

13. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "13".

14. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "14".

15. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "15".

16. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "16".

17. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "17".

18. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "18".

19. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "19".

20. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "20".

21. FFIC admits that it issued three excess policies, Nos. XLX-126-75-37, XLX-126-84-58 and XLX-126-85-77, to Tonka but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "21".

22. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "22".

23. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "23".

24. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "24".

25. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "25".

26. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "26".

27. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "27".

28. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "28".

29. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "29".

30. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "30".

31. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "31".

32. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "33".

33. FFIC denies that one source of the contamination at or near the Tonka Main is due to a "sudden and accidental," as that phrase is used by the FFIC policies, leakage from barrel storage and that a second source of the contamination is a "sudden and accidental," as that phrase is used in the FFIC policies, overflow from a storage tank. FFIC, however, lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "33".

34. FFIC denies that Tonka complied with the conditions precedent to the FFIC policies but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "34".

35. FFIC denies that Tonka complied with the conditions precedent to the FFIC policies but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "35".

36. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "36".

37. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "37".

38. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "38".

39. FFIC admits that it is not providing Tonka with a defense of the MPCA claim since it has no duty to do so but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "39".

40. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "40".

COUNT ONE
(Declaration of Rights and Liabilities)

41. FFIC repeats and realleges each and every response in paragraph "1" through "40" as if fully sets forth herein.

42. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "42".

43. FFIC admits that Tonka requests the declaration of its rights but denies that:

(a) Any costs, losses or damages occurred during the time period covered by the FFIC policies;

(b) Any costs, losses or damages constitute damage or property damage covered by the FFIC policies and are not otherwise excluded from coverage under the FFIC policies; and

(c) Pursuant to the contract between Tonka and FFIC, FFIC had and continues to have an obligation to defend Tonka.

FFIC otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "43".

44. FFIC denies that Tonka is entitled to costs and reasonable attorneys' fees incurred in obtaining this declaratory relief from FFIC but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "44".

COUNT TWO
(Breach of Contract)

45. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "19: through "23" of Tonka's Answer and repeats and realleges each and every response in paragraph "1" through "44" as if fully set forth herein.

46. FFIC denies that its refusal to defend Tonka and its refusal to indemnify Tonka constitute breaches of the contractual obligations between Tonka and FFIC but otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph "46".

47. FFIC denies that it breached its contractual obligations between Tonka and FFIC but otherwise lacks knowledge or information sufficient to form a

belief as to the truth of the remaining allegations contained in paragraph "47".

COUNT THREE

(Breach of Implied Covenant of Good Safe and Fair Dealings)
(Against Bituminous Casualty Corporation Only)

48. FFIC repeats and realleges each and every response in paragraph "1' through "47" as if fully set forth herein.

49. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "49".

50. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "50".

51. FFIC lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "51".

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. The Court lacks jurisdiction because there is no actual and/or justiciable controversy between FFIC and Tonka.

2. The counterclaim and each allegation therein fails to state a claim against FFIC upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

3. Tonka has failed to perform all of the obligations which FFIC's policies require it to perform in order to invoke coverage, including but not limited to obligations imposed by policies as to which the FFIC policies "follow form."

FOURTH AFFIRMATIVE DEFENSE

4. FFIC is not liable to Tonka because there has been no occurrence, as that term is defined by the policies.

FIFTH AFFIRMATIVE DEFENSE

5. FFIC is not liable to RCA because no occurrence, as that term is defined by the policies, has taken place during the policy periods FFIC provided insurance to Tonka.

6. FFIC is not liable to Tonka because of the pollution exclusion clause of the policies, which disallows coverage (assuming that there has been an occurrence under the policies issued to Tonka) for any aspect of the alleged contamination.

SEVENTH AFFIRMATIVE DEFENSE

7. FFIC has no contractual duty or obligation to defend and/or indemnify Tonka.

EIGHTH AFFIRMATIVE DEFENSE

8. To the extent that Tonka seeks equitable relief, Tonka is barred from recovery by the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

9. It would be contrary to public policy to grant the relief sought by Tonka.

TENTH AFFIRMATIVE DEFENSE

10. FFIC is not liable to Tonka because (assuming that there was an occurrence) Tonka, or its predecessors, failed to provide FFIC with timely notice of any occurrence in violation of the terms and conditions of the policies.

ELEVENTH AFFIRMATIVE DEFENSE

11. FFIC is not liable to Tonka because it, or its predecessors, failed to provide FFIC with timely notice of the claims against it in violation of the terms and conditions of the policies.

TWELFTH AFFIRMATIVE DEFENSE

12. FFIC is not liable for the instant claims because there has been no "property damage," as that term is defined in the policies of insurance.

THIRTEENTH AFFIRMATIVE DEFENSE

13. FFIC is not liable for the instant claims because there has been no "bodily injury" as that term is defined by the policies.

FOURTEENTH AFFIRMATIVE DEFENSE

14. FFIC is not liable to Tonka because there has been no claim for "damages" asserted against Tonka.

FIFTEENTH AFFIRMATIVE DEFENSE

15. FFIC is not liable for the instant claims because (assuming that there has been an "occurrence") all damages occurred on property alienated or owned or rented or occupied by Tonka which are thereby excluded from coverage from the terms and conditions of the policies.

SIXTEENTH AFFIRMATIVE DEFENSE

16. The action is barred, in whole or in part, on the ground of Tonka's failure to take reasonable measures to mitigate its damages.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. FFIC is not liable for monetary obligations assumed or monies voluntarily paid by Tonka in addressing the alleged contamination.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. Any attempt by Tonka to assign any rights it may have had under the FFIC insurance policies is invalid and not binding on FFIC.

NINETEENTH AFFIRMATIVE DEFENSE

19. The policies contain various limits of liability, per occurrence, in the aggregate, and/or in the event of other insurance. In the event that FFIC is found to have liability to indemnify Tonka (which is expressly denied), FFIC's liability is restricted to said limits.

TWENTIETH AFFIRMATIVE DEFENSE

20. All claims against FFIC are barred because of Tonka's failure to perform all of its respective obligations under the policies.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. All claims against FFIC are barred because of Tonka's failure to adhere to the terms and conditions of the policies.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. In obtaining insurance coverage from FFIC, Tonka misrepresented or concealed facts which would have caused FFIC to refuse to issue coverage to Tonka.

TWENTY-THIRD AFFIRMATIVE DEFENSE

23. FFIC has no obligation to indemnify Tonka for costs incurred as a result of statutory violations, criminal fines or sanctions, civil fines or sanctions, or other penalties resulting from its conduct.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. FFIC alleges that there is no coverage for any claims under the FFIC policies because FFIC's policies are excess to coverage provided by underlying and primary insurance carriers and liability, therefore, does not attach, if at all, unless and until the underlying and primary policies have been exhausted.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. This action should be dismissed on the ground of forum non conveniens.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

26. Venue in this Court is not proper.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

27. The action should be dismissed on the basis of certain exclusions, terms and conditions of the insurance policies.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

28. No coverage is provided by FFIC for any punitive damages which may be awarded against Tonka.

TWENTY-NINTH AFFIRMATIVE DEFENSE

29. The action is barred on the ground of the statute of limitations.

THIRTIETH AFFIRMATIVE DEFENSE

30. The action is barred on the ground of laches.

THIRTY-FIRST AFFIRMATIVE DEFENSE

31. Tonka is barred from seeking relief on the ground of its wrongful or intentional conduct.

THIRTY-SECOND AFFIRMATIVE DEFENSE

32. The claim is barred on the ground of Tonka's fraud and misrepresentation regarding the existence of the alleged claims.

THIRTY-THIRD AFFIRMATIVE DEFENSE

33. No coverage is provided by FFIC in the absence of an underlying judicial lawsuit.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

34. FFIC does not provide coverage for any damages which result from Tonka's violation of any rule, law or regulation.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

35. Coverage under any FFIC policy is subject to the limits of liability as set forth in the policies.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

36. Coverage under any FFIC policy is provided only to the named insured or an additional insured.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

37. The Counterclaim fails to join or otherwise make parties to this action certain necessary and indispensable parties to this action including Northfield Insurance Company.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

38. Tonka's counterclaim and joinder of FFIC is in contravention of Magistrate Bernard P. Becker's amended pretrial order dated October 1, 1987.

THIRTY-NINTH AFFIRMATIVE DEFENSE

39. Tonka's amended answer and counterclaim against FFIC is in contravention of Rule 15 of the Federal Rules of Civil Procedure which requires leave of court for the amendment of pleadings.

FORTIETH AFFIRMATIVE DEFENSE

40. Tonka's amended answer and counterclaim against FFIC is in contravention of Rule 14 of the Federal Rules of Civil Procedure which requires leave of court to assert the third-party claims.

FORTY-FIRST AFFIRMATIVE DEFENSE

41. Tonka's counterclaim against and joinder of FFIC in this action is improper; is in contravention of Federal Rules of Civil Procedure; and is prejudicial to FFIC.

WHEREFORE, Counter-defendant FFIC respectfully demands that this Court grant judgment for FFIC as follows:

1. That this Court adjudge, determine and declare that FFIC is not liable to pay and indemnify RCA for any damages, costs and payments incurred or to be incurred by RCA with respect to the underlying claims.

2. That this Court adjudge, determine and declare that FFIC has no duty to defend Tonka and no duty to pay any defense costs in connection with the underlying claims.

3. That this Court adjudge, determine and declare that FFIC is not obligated to pay Tonka the requested damages.

4. That this Court adjudge, determine and declare that FFIC is not obligated to pay Tonka the requested costs, disbursements, and attorneys' fees of this action.

5. That this Court dismiss the counterclaim as against FFIC, with costs, disbursements and attorney' fees.

6. That this Court grant such other and further relief as to this Court may deem just, proper and equitable.

JURY DEMAND

FFIC, by its undersigned attorneys, hereby demands a trial by jury.

Dated: March 3, 1988.

Respectfully submitted,

s/ Gary D. Centola
WILLIAM M. SAVINO
GARY D. CENTOLA
ALAN C. EAGLE
RIVKIN, RADLER,
DUNNE & BAYH
EAB Plaza
Uniondale, NY 11556-0111
(516) 357-3000

s/ Gay B. Urness
GAY B. URNESS
MILLER & NEARY
606 Park Nat. Bank
Bldg.
5353 Wayzata Blvd.
Minneapolis, MN 55416
(612) 544-1577
Attorney ID No. 111855